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A TREATISE
ON THE
LAW OF EVIDENCE.



A TREATISE
ON THE
LAW OF EVIDENCE,

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH
ILLUSTRATIONS FROM THE AMERICAN AND OTHER FOREIGN LAWS.

By JOHN PITT TAYLOR, Esq.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

IN TWO VOLUMES.

VOL. I.

*Longum iter est per præcepta,
Breve et efficax per exempla.—SENECA.*

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TO

THE RIGHT HONOURABLE HENRY LORD BROUGHAM,

ETC., ETC., ETC.

MY LORD,

I dedicate this Work to your Lordship, as a distinguished Statesman, an accomplished Lawyer, and what I consider a far more illustrious character than either, the most enlightened Law-Reformer of the Age.

I have the honour to be,

With feelings of real respect and regard,

Your Lordship's most obedient Servant,

J. PITT TAYLOR.

P R E F A C E.

THE following Work is founded on "Dr. Greenleaf's American Treatise on the Law of Evidence." Indeed, when, in July 1843, my attention was first especially drawn to the subject of Evidence, with a view to publication, I undertook to discharge the duties of an editor only, and it was not until I had been engaged for many months in that undertaking that I finally determined to abandon it, and to submit to the public a treatise of my own. In taking this step, I had no idle hope of being able to produce a book, which, regarded as an exposition of general principles, should surpass, or even equal that written by the learned American Professor; but I thought that, by citing more fully the leading decisions of our own Courts, and by introducing such portions of our Statute Law as related to the subject of Evidence,

I might possibly compile a work of more practical utility to the English and Irish lawyer. To have introduced this new matter in the shape of notes to Dr. Greenleaf's Treatise, would have been highly inconvenient; to have interwoven it with his text, and still to have called the work by his name, would have been alike unjust to him and to myself; and, consequently, it appeared to me, that the only alternative left, was to publish a work in my own name, for the errors of which I should be alone responsible.

I have still, however, availed myself very largely of Dr. Greenleaf's labours, having adopted, with but few alterations, his excellent general arrangement, having followed to a considerable extent the course even of his sections, and having borrowed many pages of his terse and luminous writing. My object has been to afford to the profession really useful and accurate information; and whether that information were conveyed in my own or in another's language, has been to me, as it will doubtless be to my readers, a matter of indifference.

From the American decisions cited by Dr. Greenleaf, I have made a copious selection, having referred to such,

as, in my judgment, either afforded favourable illustrations of doubtful points of law, or laid down rules superior to those adopted in our own Courts. Many of these cases I have myself collated, but, with respect to the major portion of them, I have been obliged to rely on Dr. Greenleaf's known accuracy, as I have had no opportunity of obtaining access to several of the reports cited by him. The libraries of our Inns of Court contain neither a large nor a well-chosen collection of American decisions, but I am happy to say that the librarian of the Middle Temple, with a liberality which I trust will be followed by the other Inns, has determined to remedy this evil, and has made arrangements for the purchase of all such reports as are held in estimation by the Courts of the United States.

With the view of rendering my work useful to the practitioner in Ireland, I have noticed most of the leading decisions of the Four-Courts on the Law of Evidence, and have referred to many Irish Statutes on the same subject.

In stating what the law is, I have not been unmindful of what, in my humble opinion, it ought to be; and I have therefore ventured, from time to time, to point out

briefly such alterations in the law as I conceive would effect material amendments. The Law-Reformer, by referring to the Index, Title, "Suggestions for Amending the Law of Evidence," will find what I have done on this head.

The alterations recently effected in the law, by Lord Denman's admirable Act, and by the Documentary Evidence Act, have been pointed out at length, and have been illustrated by the latest decisions.

The book contains no chapter on the Law of Stamps. This omission might perhaps be justified by simply referring to the able works of Messrs. Phillipps and Starkie, in the former of which the subject is not treated, while, in the latter, it occupies a very subordinate place in the third volume. But the reasons which chiefly influenced me in deciding to reject the Law of Stamps, were, 1st. that it has been already discussed at large in several distinct treatises; 2nd. that any exposition of it, to be of practical value, must have added much to the bulk of the work, and consequently to its price; 3rd. that it would have delayed the publication for many months; 4th. that this branch of the law will probably ere long undergo very extensive changes; and last, though I

confess not least, that it is one of the most repulsive subjects which could be selected by an author for discussion.

In a work of this magnitude, treating as it does of a fluctuating branch of the law, I am well aware that many mistakes must have occurred; for these, my only apology is, that I have spared no labour to avoid them. The language of St. Augustine is an author's best consolation:—"Illi in vos sæviant, qui nesciunt cum quo labore verum inveniatur, et quàm difficilè caveantur errores."

J. PITT TAYLOR.

2, HARCOURT BUILDINGS, TEMPLE.

10th February, 1848.

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A List of the Abbreviations

USED IN THIS TREATISE,

TOGETHER WITH A STATEMENT OF THE

EDITIONS OF THE PRINCIPAL ELEMENTARY WORKS CITED.

NOTE.—The letters A. B. C. D. appended to the American Reports, denote the relative estimation in which those Reports are held by the profession in general, out of the particular State where the decisions were pronounced; A. marking the highest degree of excellence. A very eminent American Jurist has kindly furnished the Author with this guide.

ABBREVIATIONS.	NAME OF WORK, ETC.
A. & E.	Adolphus & Ellis's Reports, King's Bench.
Abercrombie on } Intell. Pow. .. }	Abercrombie on the Intellectual Powers. 6th edition. Edinburgh, 1836.
Adam's Ant.	Adam's Roman Antiquities.
Addis.	Addison's Reports, Pennsylvania. 1791—1799. 1 vol. (C).
Add. Ec. R.	Addams' Ecclesiastical Reports.
Aik.	Aiken's Reports, Vermont. 1826—1827. 2 vols. (B).
A. K. Marsh.	See Marsh.
Alc. & Nap.	Alcock and Napier's Reports, King's Bench, Ireland.
Alciatus de Præs. .	Alciatus de Præsumptione. Alciati Opera, Basileæ, 1582. 4 tom., fol.
Alison Cr. L.	Alison's Principles of the Criminal Law of Scotland.
Alison Pract. of } Cr. L. }	Alison's Practice of the Criminal Law of Scotland.
Am. Ed.	American edition.
Am. Jurist,	American Jurist. Boston.
Amb.	Ambler's Reports, Chancery.
And.	Anderson's Reports, Common Pleas.
Andr.	Andrew's Reports, King's Bench.
Anstr.	Anstruther's Reports, Exchequer.
Anthon's R.	Anthon's Nisi Prius Reports, New York. 1808— 1818. 1 vol. (D).
Applet. R.	Appleton's Reports, Maine, from 1841. 1 vol. (C).
Arch. Cr. Pl.	Archbold's Criminal Pleading. 8th edition, 1841.
Arm. Mac. & Og. .	Armstrong, Macartney and Ogle's Reports, Nisi Prius, Ireland.

ABBREVIATIONS.	NAME OF WORK, ETC.
Arm. & Trev.	Armstrong and Trevor's Report of the Case of R. v. O'Connell, Dublin, 1844.
Atk.	Atkyns's Reports, Chancery.
Ayliffe Par.	Ayliffe's Parergon, 2nd edition, 1734.
B. & A.	Barnewall and Alderson's Reports, King's Bench.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench.
B. & B.	Broderip and Bingham's Reports, Common Pleas.
B. & C.	Barnewall and Cresswell's Reports, King's Bench.
B. & P.	Bosanquet and Puller's Reports, Common Pleas.
Bac. Ab.	Bacon's Abridgment.
Bail.	Bailey's Reports, South Carolina, 1828—1832, 2 vols. (B).
Ball & Beat.	Ball and Beatty's Reports, Chancery, Ireland.
Barnes,	Barnes's Notes of Practice Cases in Common Pleas.
Batt.	Batty's Reports, King's Bench, Ireland.
Bay,	Bay's Reports, South Carolina, 1783—1804, 2 vols. (B. C).
Bayley on Bills, ...	5th edition, London, 1830.
Beames Ord. in Ch.	Beames's General Orders in Chancery.
Beav.	Beavan's Reports, Rolls Court.
Bell, Dig.	Bell's Digest of the Laws of Scotland.
Bentham Ev. <i>or</i> } Jud. Ev. <i>or</i> } Rat. Judl. Ev. }	Bentham's Rationale of Judicial Evidence, 5 vols. London, 1827.
Best on Pres.	Best on Presumptions, London, 1844.
Bibb,	Bibb's Reports, Kentucky, 1808—1817, 4 vols. (D).
Bing.	Bingham's Reports, Common Pleas.
Bing. N. S.	Bingham's Reports, New Series, Common Pleas.
Binn.	Binney's Reports, Pennsylvania, 1799—1814, 6 vols. (A).
Bp. of Tasmania's } Lect. on Christ. } Catechism, ... }	Bishop of Tasmania's Lectures on the Christian Catechism.
Bl. Com.	Blackstone's Commentaries.
H. Bl.	Henry Blackstone's Reports, Common Pleas.
W. Bl.	Sir William Blackstone's Reports, (K. B. & C. P.)
Bland Ch.	Bland's Chancery Reports, Maryland, 1811—1830, 2 vols. (C).
Blackf.	Blackford's Reports, Indiana, 1817—1838, 4 vols. (C. D).
Bligh,	Bligh's Reports, House of Lords.
Bligh N. S.	Bligh's Reports, New Series, House of Lords.
B. Moore,	See Moore.
B. N. P.	Buller's Law of Nisi Prius.
Bott,	Bott's Poor Laws.
Br. C. C.	Brown's Chancery Cases.
Br. P. C.	Brown's Parliamentary Cases.
Bro. Abr.	Brooke's Abridgment.
Browne,	Browne's Reports, Pennsylvania, 1806—1814, 2 vols. (C).
Brownl.	Brownlow's Reports.
Buck,	Buck's Reports in Cases of Bankruptcy.

ABBREVIATIONS.	NAME OF WORK, ETC.
Bulst.	Bulstrode's Reports.
Bunb.	Bunbury's Reports, Exchequer.
Burge, Comm. on Col. & For. Laws,	Burge's Commentaries on Colonial and Foreign Laws, 4 vols. London, 1838.
Burn's Ec. L.	Burn's Ecclesiastical Law, 9th edition, London, 1842.
Burn, Just. by Chit.	Burn's Justice of the Peace, by Chitty, 29th edition, London, 1845.
Burnet Cr. Law, ...	Burnet on Criminal Law of Scotland.
Burr.	Burrow's Reports, King's Bench.
Burr. S. C.	Burrow's Settlement Cases, King's Bench.
Bynk. Obs. Jur. Rom.	Bynkershoek, Libri Observationum Juris Romani.
C. & J.	Crompton and Jervis's Reports, Exchequer.
C. & Kir.	Carrington and Kirwan's Nisi Prius Reports.
C. & M. or Cr. & M.	Crompton and Meeson's Reports, Exchequer.
C. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer.
C. & Marsh.	Carrington and Marshman's Nisi Prius Reports.
C. & P.	Carrington and Payne's Nisi Prius Reports.
Caines, R.	Caines's Reports, New York, 1803—1805, 3 vols. (A).
Cald.	Caldecott's Reports of Settlement Cases.
Calv. Lex.	Calvini Lexicon Juridicum Juris Cæsarii. Genevæ, 1645, fol.
Camp.	Campbell's Nisi Prius Reports.
Canciani Leges barbarorum antiquæ	Venetis, 1781—1785, 5 vols. fol.
Car. Cr. L. or Carr. Suppl.	Carrington's Supplement of Treatises on Criminal Law.
Carpzov. Pract. Rer. Cr.	Carpzovii Practicæ Rerum Criminalium. Francof. ad Mænum, 1758, 3 vols. fol.
Carth.	Carthew's Reports, King's Bench.
Cas. temp. Hard.	Cases in the time of Lord Hardwicke.
Cas. temp. Lee, ...	Ecclesiastical Reports in the time of Sir G. Lee.
Channing,	Channing's works, 5 vols. 3rd edition, Glasgow, 1840.
Chit. on Bills,	Chitty on Bills of Exchange, 9th edition, London, 1840.
Chit. Cr. L.	Chitty's Treatise on the Criminal Law, 2nd edition, London, 1826.
Chit. Forms,	Chitty's Forms of Practical Proceedings in Common Law Courts, 6th edition, London, 1847.
Chit. Gen. Pract. ..	Chitty's General Practice.
Chit. on Pl.	Chitty, Senior, on Pleading, 7th edition, London, 1844.
Chit. R.	Chitty's Reports, King's Bench.
Cic. Fam. Ep. ...	Ciceronis Familiæ Epistolæ.
City Hall Rec. ...	New York Recorder, containing Reports of Cases in City Courts from 1816 to 1821, 6 vols.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords.
Clifford, South- wark El. Cas. }	Clifford's Southwark Election Case.
Co.	Lord Coke's Reports, London, 1826.
Co. Lit.	Coke on Littleton.
Cock. & R.	Cockburn and Rowe's Election Cases.

ABBREVIATIONS.	NAME OF WORK, ETC.
Cod. Lib.	Codex Theodosianus, Jacobi Gothofredi.
Code de Proc. Civ.	Code Napoleon de Procedure Civile.
Coll. C. R.	Collyer's Chancery Reports.
Com.	Commonwealth.
Com. B.	Manning, Granger and Scott's Reports, Common Pleas.
Com. Di.	Comyn's Digest.
Com. J.	Journals of the House of Commons.
Comb.	Comberbach's Reports, King's Bench.
Conklin's Pr.	Conklin's Practice of the Courts of the United States, New York, 1842.
Conn.	Connecticut Reports, by T. Day, 1814 to present time, 15 vols. (B).
Cons. R.	Haggard's Consistory Reports.
Const. R.	Constitutional Reports, South Carolina, 1812—1816, 2 vols. (B. C).
Const. & Canon. ...	Constitutions and Canons Ecclesiastical.
Const. U. S. } Amendm. ... }	Amended Constitution of the United States.
Cook. & Alc.	Cooke and Alcock's Reports, King's Bench, Ireland.
Cooke, R.	Cooke's Reports, Tennessee, 1811—1814, 1 vol. (D).
Coop. C. P. R. ...	Charles Purton Cooper's Cases in Chancery.
Cor.	St. Paul's Epistles to the Corinthians.
Corner Cr. Pr. ...	Corner's Crown Practice in Queen's Bench, London, 1844.
Cowen,	Cowen's Reports, New York, 1823—1828, 9 vols. (A).
Cowp.	Cowper's Reports, King's Bench.
Cox, or Cox Ch. Cas.	Cox's Reports, Chancery.
Coxe,	Coxe's Reports, New Jersey, 1790—1795, 1 vol. (C).
Cr. & Ph.	Craig and Phillips' Reports, Chancery.
Cranch,	Cranch's Reports, Supreme Court of United States, 1800—1815, 9 vols. (A).
Crawf. & Dix, } Abr. C. }	Crawford and Dix's Abridged Notes of Cases in Ireland.
Crawf. & Dix, C. C.	Crawford and Dix, Irish Circuit Reports.
Cro. Car.	Croke's Reports of the time of King Charles I.
Cro. Eliz.	Croke's Reports in the reign of Queen Elizabeth.
Cro. Jac.	Croke's Reports in the reign of King James.
Crown Cir. C.	Ryland's Crown Circuit Companion.
Cruise on Dign. ...	Cruise on Dignities or Titles of Honour.
Cujac. Op. Posth...	Cujaccii Opera Posthuma.
Curt. Ec. R.	Curteis' Ecclesiastical Reports.
D. & M. or D. & Mer.	Davison and Merivale's Reports, Queen's Bench.
D. & R.	Dowling and Ryland's Reports, King's Bench.
D. & R. Mag. Ca...	Dowling and Ryland's Magistrates' Cases.
D & R., N. P. C...	Dowling and Ryland's Nisi Prius Cases.
Dalison,	Dalison's Reports.
Dall.	Dallas's Reports. Supreme Courts of United States, and Pennsylvania, 1790—1806, 4 vols. (A).
Dalt.	Dalton's Country Justice.
Dan. Ch. Pr.	Daniell's Chancery Practice, 2nd edition, by T. E. Headlam. London, 1845.

ABBREVIATIONS.	NAME OF WORK, ETC.
Dane's Abr.	Dane's Abridgment, United States.
Danty,	Traité de la Preuve, Paris, 1697, 4to.
Davidson, Conc. } Prec. of Convey. }	Davidson's Concise Precedents of Conveyancing.
Day,	Day's Reports, Connecticut, 1802—1810, 5 vols. (B).
Dea. & C.	Deacon and Chitty's Reports, Bankruptcy.
Dec. Greg.	Decretals of Pope Gregory IX.
Den.	Denison's Crown Cases reserved.
Dev.	Devereux' Reports, North Carolina, 1826—1834. 4 vols. (B).
Dever. & Batt. ...	Devereux and Battle's Reports, North Carolina. 1834 —1840. 4 vols. (B).
Dickinson Quart. } Sess. }	Dickinson's Quarter Sessions. 6th edition. London, 1846.
Dick.	Dickens's Reports, Chancery.
Dig. Lib.	Digests of Civil Law.
Dods. Adm.	Dodson's Reports, Court of Admiralty.
Dom. Proc.	House of Lords.
Doug.	Douglas's Reports, King's Bench.
Dow,	Dow's Reports, House of Lords.
Dowl.	Dowling's Practice Cases, Old Series. All the Com- mon Law Courts.
Dowl. N. S.	Dowling's Practice Cases, New Series. All the Com- mon Law Courts.
Dowl. & L.	Dowling and Lowndes's Practice Cases. All the Com- mon Law Courts.
Dr. & St.	Doctor and Student.
Drury, Ch. R. } temp. Sugden, }	Drury's Irish Chancery Reports, in the time of Sugden, Ch.
Dru. & War.	Drury and Warren's Reports, Chancery, Ireland.
Dyer,	Dyer's Reports.
Eag. & Y.	Eagle and Younge's Reports of Tithe Cases.
East,	East's Reports, King's Bench.
East P. C.	East's Pleas of the Crown.
Edinb. Rev.	Edinburgh Review.
Eq. Cas. Ab. or } Eq. Ab. Cas. }	Equity Cases Abridged.
Ersk. Inst.	Erskine's Institutes of the Law of Scotland.
Esp.	Espinasse's Nisi Prius Reports.
Everhardi Conc. ...	Everhardi Concilia. Antwerp. 1643, fol.
Ex. R.	Exchequer Reports by Welsby, Harlestone and Gordon.
Fairf.	Fairfield's Reports, Maine, 1833—1835. 3 vols. (B).
Farinacii Op.	Farinacii Opera. Francof. ad Mœnum. 1684. 4 vols. fol.
Ff.	Pandecta Juris Civilis.
Fitzg.	Fitzgibbon's Reports. All the Courts.
Forrest,	Forrest's Reports, Exchequer.
Fost. or Fost. C. } L. or Foster's } Disc. }	Sir M. Foster's Crown Law, 3rd edition, 1792.
Fox & Smith,	Fox and Smith's Reports, King's Bench, Ireland.
Freem.	Freeman's Reports.

ABBREVIATIONS.	NAME OF WORK, ETC.
G. & D.	Gale and Davison's Reports, Queen's Bench.
Gale,	Gale's Reports, Exchequer.
Gall.	Garrison's Reports, United States, 1st Circuit Court, 1812—1815, 2 vols. (A). Judge Story's Decisions.
Gambier's Guide, ..	Gambier's Guide to the Study of Moral Evidence.
Gibson's Cod.	Gibson's Codex Juris Ecclesiastici Anglicani.
Gilb. Eq. R.	Gilbert's Equity Reports.
Gilb. Evid.	Gilbert on Evidence.
Gill & John.	Gill and Johnson's Reports, Maryland, 1829—1840, 10 vols. (B).
Glassford Ev.	Glassford on Evidence, Edinburgh, 1820.
Godb.	Godbolt's Reports.
Gow,	Gow's Nisi Prius Reports.
Greenl.	Greenleaf's Reports, Maine, 1820—1832. (B).
Greenl. on Test. of Evang.	Dr. Greenleaf on the testimony of the Evangelists, 2nd edition, London, 1847.
Gresl. Ev.	Gresley on Evidence in Courts of Chancery, paging of 1st ed. retained in margin of 2nd ed., published in 1847, London.
Gwill.	Gwillim's Reports of Statutes and Cases on Tithes.
H. Bl.	See Bl.
Hagg. Cons.	Haggard's Consistory Reports.
Hagg. Ec. R.	Haggard's Ecclesiastical Reports.
Hale,	Lord Hale's Pleas of the Crown.
Halst.	Halstead's Reports, New Jersey, 1821 — 1831. 7 vols. (C).
Har. & Gill,	Harris and Gill's Reports, Maryland, 1826—1829. 2 vols. (B).
Har. & M'Hen. ...	Harris and M'Henry's Reports, Maryland, 1700 — 1799. 4 vols. (D).
Har. & W.	Harrison and Wollaston's Reports, King's Bench.
Hardin,	Hardin's Reports, Kentucky, 1805—1808. 1 vol. (D).
Hare,	Hare's Reports, V.-C. Wigram's Court.
Harg.L. Tracts, ...	Hargrave's Law Tracts.
Harg. St. Tr.	Hargrave's State Trials.
Hardr.	Hardres's Reports, Exchequer.
Harr. & J.	Harris and Johnson's Reports, Maryland, 1800—1826. 7 vols. (B).
Hawk.	Hawkins' Pleas of the Crown.
Hawks,	Hawks' Reports, North Carolina, 1820 — 1826. 4 vols. (C).
Hayes,	Hayes' Reports, Exchequer, Ireland.
Hayes & Jon. ...	Hayes and Jones' Reports, Exchequer, Ireland.
Hayw.	Haywood's Reports, North Carolina, 1789—1806 (C).
Hein. ad Pand. ...	Heineccius ad Pandectas. 5th tom. of his Works.
Hen. & Munf.	Henning and Munford's Reports, Virginia, 1806 — 1809. 4 vols. (C).
Hertius de Coll. Leg.	Hertius de Collisione Legum.
Hill or Hill, S. Car. R.	Hill's Reports, South Carolina, 1833—1835. 2 vols. (B, C).
Hill N. Y. R.	Hill's Reports, New York, 1841—1842. 3 vols. (B).

ABBREVIATIONS.	NAME OF WORK, ETC.
Hob.	Hobart's Reports.
Hoffman on Leg. } Study }	Hoffman's Course of Legal Study. 2nd edition, 1836.
Holt,	Lord Holt's Reports.
Holt N. P. R.	Holt's Nisi Prius Reports.
How. St. Tr.	Howell's State Trials. 34 vols.
Howard S. Ct. R.	Howard's Reports, United States, Supreme Court, from 1843. (A).
Hubb. Ev. of Suc.	Hubback on Evidence of Succession, London, 1844.
Hume on Cr., or } Hume Comm. }	Hume's Commentaries on Law of Scotland respecting Crimes.
Humphrey's R. ...	Humphrey's Reports, Tennessee, 8139 — 1841. 2 vols. (D).
Hutt.	Hutton's Reports.
J. Kel.	See Kel.
Inst.	Coke's Institutes.
Ir.	Irish.
Ir. Cir. R.	Irish Circuit Reports.
Ir. Eq. R.	Irish Equity Reports.
Ir. Law R.	Irish Law Reports.
Iredell R.	Iredell's Reports, North Carolina, 1840 — 1841, 1 vol. (C).
J. J. Marsh.	See Marsh.
J. B. Moore,	See Moore.
Jac.	Jacob's Reports, Chancery.
Jac. & Walk.	Jacob and Walker's Reports, Chancery.
Jacobsen's Sea L. .	Jacobsen's Sea Laws.
Jebb, C. C.	Jebb's Crown Cases Reserved, Ireland.
Jebb & Bourke, ...	Jebb and Bourke's Reports, Queen's Bench, Ireland.
Jebb & Sy.	Jebb and Symes' Reports, Queen's Bench, Ireland.
Johns.	Johnson's Reports, New York, 1806 — 1823, 20 vols. (A).
Johns. Ch. R.	Johnson's Chancery Reports, New York, 1814—1823, 7 vols. (A).
Jones, Ex. R.	Jones' Exchequer Reports, Ireland.
T. Jones,	Sir Thomas Jones' Reports.
W. Jon.	Sir William Jones' Reports.
Jones & Lat.	Jones and Latouche's Reports, Chancery, Ireland.
Joy on Conf.	Joy on Confessions in Criminal Cases. Dublin, 1842.
Jur.	Jurist Reports. All the Courts.
Keb.	Keble's Reports, King's Bench.
Keen,	Keen's Reports, Chancery.
Kel. or J. Kel. ...	Sir J. Kelyng's Reports.
Kent Com.	Kent's Commentaries, Boston, 1840.
Kirby,	Kirby's Reports, Connecticut, 1785—1788, 1 vol. (D).
Knapp, P. C. R. ...	Knapp's Privy Council Reports.
Knapp & Omb. ...	Knapp and Ombler's Election Cases.
L. J. (N. S.) Ch. } or Q. B. or C. } P. or Ex. or } M. C. }	Law Journal, (New Series) Cases in Chancery, Queen's Bench, Common Pleas, or Exchequer, or Magistrates' Cases.
LL. U. S.	Laws of the United States.

ABBREVIATIONS.	NAME OF WORK, ETC.
Law Rec. 1st. Ser. or 2nd Ser. }	Law Recorder, 1st or 2nd Series. Irish.
Law R.	Law Review.
Law Mag.	Law Magazine.
Law Mag. N. S.	Law Magazine, New Series.
Lea. or Lea. C. C.	Leach's Crown Cases Reserved. 4th edition, London, 1815.
Leg. Obs.	Legal Observer.
Leigh, R.	Leigh's Reports, Virginia, 1829—1839. 9 vols. (B).
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lew. C. C. or Lew. R. }	Lewin's Crown Cases on Northern Circuit.
Lit. R.	Littleton's Reports.
Lloyd & Goold, or Lloyd & G. temp. Sugden, }	Lloyd and Goold's Irish Chancery Reports in the time of Sugden, Ch.
Lofft,	Lofft's Reports, King's Bench.
Long. & Town. ...	Longfield and Townsend's Reports, Exchequer, Ireland.
Lords' J.	Journals of the House of Lords.
Ld. Raym.	See Raym.
Louis.	Reports of Louisiana, 1830—1840. 16 vols. (B).
Luders,	Luders's Election Cases.
Lutw.	Lutwyche's Reports.
M. & Gr.	Manning and Granger's Reports, Common Pleas.
M. & M.	Moody and Malkin's Nisi Prius Reports.
M. & P.	Moore and Payne's Reports, Common Pleas.
M. & R.	Manning and Ryland's Reports, King's Bench.
M. & Rob.	Moody and Robinson's Nisi Prius Reports.
MS.	Manuscript.
M. & Sc.	Moore and Scott's Reports, Common Pleas.
M. & Sel.	Maule and Selwyn's Reports, King's Bench.
M. & W.	Meeson and Welsby's Reports, Exchequer.
McC. or McCord, ...	McCord's Reports, South Carolina, 1820—1828, 4 vols. (B. C.)
McC. Ch. R.	McCord's Chancery Reports, South Carolina, 1825—1827, 2 vols. (B. C.)
McClel.	McClelland's Reports, Exchequer.
McClel. & Y.	McClelland and Younge's Reports, Exchequer.
Mac. Pr. in House of L.	Macqueen's Practice in the House of Lords and Privy Council.
McDouall's Inst. .	McDouall's (Lord Bankton) Institutes of the Laws of Scotland.
McKinnon's Phil. } of Ev. }	McKinnon's Philosophy of Evidence.
McNally Ev.	McNally on Evidence, Ireland.
Madd.	Maddock's Reports, Chancery.
Magens,	Magens on Insurance. London, 1754.
Mann. Dig. N. P. ..	Manning's Digested Index to the Nisi Prius Reports.
Marsh.	Marshall's Reports, Common Pleas.

ABBREVIATIONS.	NAME OF WORK, ETC.
A. K. Marsh.	A. K. Marshall's Reports, Kentucky, 1817—1821, 3 vols. (D).
J. J. Marsh.	J. J. Marshall's Reports, Kentucky, 1829—1832, 7 vols. (D).
Martin,	Martin's Reports, Louisiana, 1809—1823, 12 vols. (B).
Mart. N. S.	Martin's Reports, New Series, Louisiana, 1823—1830, 8 vols. (B).
Martin, N. Car. R.	Martin's North Carolina Reports, 1 vol. (D).
Mart. & Yerg. ...	Martin and Yerger's Reports, Tennessee, 1825—1828, 1 vol. (D).
Masc. or Mascar. } de Prob. }	Mascardus de Probationibus. Francof. ad Mœnum, 4 vols., fol. 1684.
Mason,	Mason's Reports, United States, 1st Circuit Court, 1816—1830, 5 vols. (A). Judge Story's Decisions.
Mass.	Reports of Massachusetts, 1804—1822 (A).
Mathews, Pres. Ev.	Mathews's Treatise on Presumptive Evidence.
May, Law of Parl.	May's Law of Parliament.
Menoch. de Præs. .	Menochius de Præsumptionibus. Genevæ, 1670, 2 tom. fol.
Mer.	Merivale's Reports, Chancery.
Metc.	Metcalf's Reports, Massachusetts, 1840—1842 (A.)
Milw. Ec. Ir. R. temp. Radcliffe,	Milward's Ecclesiastical Irish Reports in the time of Dr. Radcliffe.
Min. Ev.	Minutes of Evidence in Peerage Claims, &c.
Mitf on Pl.	Mitford (Lord Redesdale) on Pleadings in Chancery, 5th edition, London, 1847.
Mod.	Modern Reports. All the Courts.
Moll.	Molloy's Reports, Chancery, Ireland.
Mon. & Ayr.	Montagu and Ayrton's Reports, Bankruptcy.
Mon. & B.	Montagu and Bligh's Reports, Bankruptcy.
Mon. D. & D.	Montagu, Deacon, and De Gex's Reports, Bankruptcy.
Mon. & McAr. ...	Montagu and McArthur's Reports, Bankruptcy.
Monroe,	Monroe's Reports, Kentucky, 1824—1828, 7 vols. (D).
Moo. C. C.	Moody's Crown Cases Reserved.
Moo. P. C. R. ...	Moore's Privy Council Reports.
Moore, [if no vol. mentioned] ... }	Sir F. Moore's Reports.
Moore, [if vol. mentioned,] or B. Moore, or J. B. Moore, ... }	John Bayly Moore's Reports, Common Pleas.
Morison,	Morison's Scotch Reports.
Munf.	Munford's Reports, Virginia, 1810—1820, 6 vols. (C).
Murph.	Murphey's Reports, North Carolina, 1804—1819, (C).
Myl. & Cr.	Mylne and Craig's Reports, Chancery.
Myl. & K.	Mylne and Keen's Reports, Chancery.
N. & M.	Nevile and Manning's Reports, King's Bench.
N. & P.	Nevile and Perry's Reports, Queen's Bench.
N. R.	Bosanquet and Puller's New Reports, Common Pleas.
N. Y. Rev. Stat. ...	Revised Statutes of New York.
Nelson's Col. of State Pap. ... }	Nelson's Collection of State Papers.
N. or New Hamps. R.	Reports of New Hampshire, 1816—1843, (B).

ABBREVIATIONS.	NAME OF WORK, ETC.
New Sess. Cas....	See Sess. Cas.
Noy,	Noy's Reports.
Nott & M'C.	Nott and M'Cord's Reports, South Carolina, 1817—1820, 2 vols. (B).
Ohio R.	Hammond's Ohio Reports, Ohio, 1821—1839, 9 vols. (D).
Ought.	Oughton's Ordo Judiciorum.
Owen,	Owen's Reports, King's Bench and Common Pleas.
P. 7 E. 4, fol. 5, } pl. 13	Mode of Citing the Year Books.
P. & D. or P. & Dav.	
P. Voet, de Statutis.	Perry and Davison's Reports, Queen's Bench.
P. Wms.	Paul Voet de Statutis.
Paige,	Peere Williams' Reports, mostly Chancery.
Paine,	Paige's Chancery Reports, New York, 1828—1841, 8 vols. (B).
Paine & Duer, Pr. .	Paine's Reports, United States, Second Circuit Court, 1810—1826, 1 vol. (B).
Paley on Conv. ...	Paine and Duer's Practice of the Courts of the United States, New York, 1830.
Paley, Ev. of Christ.	Paley on Convictions.
Palm.	Paley's Evidences of Christianity. Works in 5 vols, London, 1830.
Park, Ins.	Palmer's Reports, King's Bench.
Parl. Deb.	Park on Marine Insurance, 8th edition, London, 1842.
Partid.	Parliamentary Debates.
Pea. Ad. R. or } Pea. Add. Cas. }	Lopez' Siete Partidas del Rey Alonzo IX., Valladolid, 1587, 4 tom. fol.
Pea. Ev.	Peake's Additional Nisi Prius Cases.
Pea. R.	Peake on Evidence, 5th edition, London, 1822.
Pears. Chit. Pl. ...	Peake's Nisi Prius Reports, 3rd edition, 1820, but keeping the paging of 1st edition.
Peck,	Pearson's Chitty, Junior, Precedents in Pleading, 2nd edition, London, 1847.
Penning.	Peck's Reports, Tennessee, 1822—1824, 1 vol. (D).
Pennsylv.	Pennington's Reports, New Jersey, 1806—1813, 2 vols. (C).
Pet.	Reports of Pennsylvania, 1829—1832, 3 vols. (B).
Pet. C. C. R.	Peter's Reports, Supreme Court of United States, 1827—1843. (A).
Petersdorff's Abr. .	Peter's Circuit Court Reports, United States, 3d Circuit Court, 1803—1818, 1 vol. (B).
Ph. Ev.	Petersdorff's Abridgment.
Phill.	Phillipps on Evidence, 9th edition, London, 1843.
Phill. Ec. R. or } Phillim. R. ... }	Phillips' Reports, Chancery.
Pick.	Phillimore's Ecclesiastical Reports.
Plowd.	Pickering's Reports, Massachusetts, 1822—1840. (A).
Pollex.	Plowden's Commentaries or Reports.
Poph.	Pollexfen's Reports.
	Popham's Reports.

ABBREVIATIONS.	NAME OF WORK, ETC.
Porter,	Porter's Reports, Alabama, 1834—1839, 9 vols. (D).
Pothier, Œuvres } Posth. }	Pothier, Œuvres Posthumes.
Poth. Obl.	Pothier on Obligations, by Evans, Philadelphia edition, 1826.
Pr. Min.	Printed Minutes of Evidence on Peerage Claims in House of Lords.
Pre. in Ch.	Precedents in Chancery.
Prest. on Abstracts	Preston's Essay on Abstracts of Title.
Price,	Price's Reports, Exchequer.
Puff.	Puffendorf's Law of Nations.
Q. B.	Adolphus and Ellis's Reports, New Series, Queen's Bench.
Quintil. Inst. Orat.	Quintilianus de Institutione Oratoriâ.
R.	Rex or Regina.
R. & R.	Russell and Ryan's Crown Cases Reserved.
Rail. Cas.	Railway Cases. All the Courts.
Rand. or Randolph,	Randolph's Reports, Virginia, 1821—1828, 6 vols. (B).
Rat. of Judl. Ev....	See Bentham.
Rawle,	Rawle's Reports, Pennsylvania, 1828—1835, 5 vols. (A)
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas
T. Ray., or Sir } T. Ray. }	Sir Thomas Raymond's Reports. All the Common Law Courts.
Reg. Gen. H. T., or E. T., or T. } T., or M. T. }	Regulæ Generales of Hilary, Easter, Trinity, or Michaelmas Term.
Reid on Human } Mind, }	Dr. Reid's Collected Works, edited by Sir William Hamilton, Bart. Edinburgh, 1846.
Rep.	Lord Coke's Reports.
Rep. tem. Hardw.	Reports in the time of Lord Hardwicke.
Rep. on Ch. Pr. ...	Report of the Commissioners on Chancery Practice.
Rep. of Cri. Law } Com. }	Reports of Criminal Law Commissioners.
Res.	Respublica.
Rev. Code,	Revised Code.
Rev. St.	Revised Statutes of different States in America.
Ridg. Lapp & Sch.	Ridgway, Lapp and Schoales's Reports, King's Bench, Ireland.
Ridg. P. C., or } Ridg.App.Cas. } or Ridgway's } R. }	Ridgway's Parliamentary Cases, Irish Parliament.
Riley's Law C. ...	Riley's Law Cases, South Carolina, 1836—1837. 1 vol. (B).
Rob. Adm.	Dr. Robinson's Admiralty Reports.
Roberts. Ec. R. ...	Robertson's Ecclesiastical Reports.
Robinson on Gavel.	Robinson on Gavelkind.
Rog. on Elect. ...	Rogers on Elections. 6th edition, London, 1841.
Roll. Abr.	Rolle's Abridgment.
Roll. R.	Rolle's Reports, King's Bench.
Roscoe Ev.	Roscoe on Evidence at Nisi Prius. 6th edition, London, 1844.

ABBREVIATIONS.	NAME OF WORK, ETC.
Rose,	Rose's Reports, Bankruptcy.
Russ.	Russell's Reports, Chancery.
Russ. C. & M. ...	Russell on Crimes and Misdemeanors. 3rd edition, London, 1843.
Russ. on Fact. ...	Russell on Factors and Brokers. London, 1844.
Russ. & Myl.	Russell and Mylne's Reports, Chancery.
Ry. & M.	Ryan and Moody's Nisi Prius Reports.
S. C.	Same case.
S. P.	Same point.
Salk.	Salkeld's Reports. All the Common Law Courts.
Saund.	Saunders' Reports, edited by Williams, J., 6th edition, London, 1845.
Say.	Sayer's Reports.
Sch. & Lef.	Schoale's and Lefroy's Reports, Chancery, Ireland.
Scott,	Scott's Reports, Common Pleas.
Scott's N. R.	Scott's New Reports, Common Pleas.
Selw. N. P.	Selwyn's Law of Nisi Prius, 11th edition, 1845, London.
Serg. & R.	Sergeant and Rawle's Reports, Pennsylvania, 1818—1829, 17 vols. (A).
Sess. Ca.	New Sessions Cases, by Carrow, Hamerton, and Allen.
Shepl.	Shepley's Reports, Maine, 1836—1841, 6 vols. (C).
Shep. Touch.	Sheppard's Touchstone.
Shower,	Shower's Reports.
Sid.	Siderfin's Reports.
Sir T. Ray.	See Ray.
Sim.	Simons' Reports, Vice-Chancellor's Court.
Sim. & St.	Simons and Stuart's Reports, Vice-Chancellor's Court.
Skinn.	Skinner's Reports, King's Bench.
Smith's Ch. Pr. ...	Smith's Chancery Practice, 3d edition, London, 1844.
Smith's L. C.	Smith's Leading Cases.
South.	Southard's Reports, New Jersey, 1816—1820, 2 vols. (C).
St. Ev.	Starkie on Evidence, 3d edition, 1842, London.
Stair Inst.	Stair's Institutes of the Law of Scotland.
Stark. R.	Starkie's Nisi Prius Reports.
Stephens Pl.	Stephens on Pleading, 5th edition, London, 1843.
Story Agen.	Story on Agency, London, 1839.
Story on Bail. ...	Story on Bailments.
Story on Bills of Ex.	Story on Bills of Exchange, London, 1843.
Story Conf.	Story's Conflict of Laws, 2nd edition, London, 1841.
Story Eq. Jur. ...	Story's Commentaries on Equity Jurisprudence, 4th edition, London and Boston, 1846.
Story Eq. Pl.	Story on Equity Pleading, 3d edition, London and Boston, 1844.
Story on Part. ...	Story on Partnership, London and Boston, 1841.
Stor. R.	Story's Reports, United States, 1st Circuit, 1839—1841. 1 vol. (A). Judge Story's Decisions.
Str. or Stra.	Strange's Reports in all Courts.
Strykios de Sem. } Prob. }	Strykios de Semiplenâ Probatione. Strykii Opera, Francof. ad Mœnum. 1743—1753. 15 vols. fol.
Sty.	Stylys's Reports.

ABBREVIATIONS.	NAME OF WORK, ETC.
Sugden on Pow. ...	Sir Ed. Sugden on Powers.
Sug. V. & P.	Sir Ed. Sugden's Vendors and Purchasers, 10th edition. 1839.
Sumn.	Sumner's Reports, 1st Circuit Court of United States. Judge Story's Decisions. 1830—1839. 3 vols. (A).
Swanst.	Swanston's Reports, Chancery.
Swift's Dig.	Swift's American Digest.
Swift's Ev.	Swift's American Law of Evidence, Hartford.
T. R.	Durnford and East's Term Reports, King's Bench.
T. Jones,	See Jones.
T. Ray.	See Ray.
Tait, Ev.	Tait on Evidence, Edinburgh, 1834.
Taunt.	Taunton's Reports, Common Pleas.
Tidd,	Tidd's Practice, 9th edition, London.
Toller on Ex.	Toller on the Law of Executors and Administrators.
Tomlin's L. Dict. ..	Tomlin's Law Dictionary.
Turn. & R.	Turner and Russell's Reports, Chancery.
Tyr.	Tyrwhitt's Reports, Exchequer.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer.
U. S.	United States.
Van Leeuw. Comm.	Van Leeuwen's Commentaries.
Vaugh.	Vaughan's Reports, Common Pleas.
Ventr.	Ventris's Reports, King's Bench and Common Pleas.
Verm.	Vermont Reports, Vermont, 1826—1837. 9 vols. (B).
Vern.	Vernon's Reports, Chancery.
Ves.	Vesey Junior's Reports, Chancery.
Ves. & B.	Vesey and Beames's Reports, Chancery.
Ves. Sen.	Vesey Senior's Reports, Chancery.
Vin. Abr.	Viner's Abridgment.
Virg. Cas.	Virginia Cases, Virginia, 1789—1826, 2 vols. (D).
W. Bl.	See Bl.
W. Jon.	See Jones.
W. W. & H.	Willmore, Wollaston and Hodges' Reports, Queen's Bench.
Wash.	Washington's Reports, Virginia, 1790—1796, 2 vols. (C)
Wash. C. C. R. ...	Washington's Circuit Court Reports, United States, 3rd Circuit Court, 1803—1827, 4 vols. (B).
Watk. Copyh. ...	Watkins on Copyholds.
Watts,	Watts's Reports, Pennsylvania, 1832—1840, 10 vols. (A).
Watts & Serg. ...	Watts and Sergeant's Reports, Pennsylvania, 1841, 1842, 3 vols. (A).
Webst. Pat. R. ...	Webster's Reports on Patent Cases.
Wend.	Wendell's Reports, New York, 1828—1841 (A).
Whart.	Wharton's Reports, Pennsylvania, 1835—1840, 6 vols. (A).
Whately's Log. ...	Whately's Logic, 3rd edition. ~ London, 1829.
Whately's Rhet. ...	Whately's Rhetoric, 3rd edition. Oxford, 1830.
Wheat.	Wheaton's Reports, Supreme Court of United States, 1816—1827 (A).
Wheeler C. C. ...	Wheeler's Criminal Cases, New York, 3 vols. (D).

ABBREVIATIONS.	NAME OF WORK, ETC.
Wigram on Disc. .	Vice-Chancellor Wigram's Points on the Law of Discovery, 2nd edition. London, 1840.
Wigram on Wills, .	Vice-Chancellor Wigram on the Interpretation of Wills, 3rd edition. London, 1840.
Wightw.	Wightwick's Reports, Exchequer.
Will. on Ex.	Williams on Executors and Administrators, 3rd edition. London, 1841.
Willes,	Willes' Reports, mostly Common Pleas.
Wills Cir. Ev.	Wills on Circumstantial Evidence, London, 1838.
Wils.	Wilson's Reports, King's Bench and Common Pleas.
Wils. Ex.	Wilson's Reports, Exchequer in Equity.
Wing. Max.	Wingate's Maxims.
Wms. Saund.	See Saund. R.
Woodfall's Junius, .	3 vols., 1812, London.
Woodfall's L. & T.	Woodfall's Treatise on the Law of Landlord and Tenant, 5th edition, London, 1843.
Wood's Inst. LL. } Eng.	Wood's Institutes of the Laws of England, fol. 1772.
Wright R.	Wright's Reports, Ohio, 1831—1834, 1 vol. (D).
Yeates,	Yeates's Reports, Pennsylvania, 1791—1808, 4 vols. (B).
Yelv.	Yelverton's Reports.
Yerg.	Yerger's Reports, Tennessee, 1832—1837, 10 vols. (D).
You.	Younge's Reports, Exchequer in Equity.
You. & Coll. Ch. R.	Younge and Collyer's Reports, Vice-Chancellor's Court.
You. & Coll. Ex. R.	Younge and Collyer's Reports, Exchequer.
You. & Jer.	Younge and Jarvis's Reports, Exchequer.

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- 2. n. (d) *for* Carentedr's Co., *read* Carpenter's Co.
- 5. n. (g) first line, *insert* Brandao v. Barnett, 12 Cl. & Fin., 787 ; 3 Com. B. 519, S.C. reversing judgment of Ex. Ch., but affirming that part of it, which relates to judicial notice of the general lien of bankers.
- 7. n. (b) *after* Reynolds v. Fenton, *insert* 2 Com. B. 191.
- 9. n. (p) at end, *insert* See 10 & 11 Vict. c. 119, § 5 ; 1 & 2 Vict. c. 56, § 121, Ir. ; 10 & 11 Vict. c. 90, § 3, Ir.
- 15. n. (n) *for* Green v. Weller, *read* Green v. Waller.
- 18. n. (m) at end, *insert* 3 Com. B. 661, S. C.
- 18. n. (r) at end, *insert* 3 Com. B. 661, S. C.
- 75. n. (t) *for* Toster v. Charles, *read* Foster v. Charles.
- 110. n. (t) at end, *for* as will, *read* as a will.
- 113. n. (b) at end, *insert* Doe v. Young, 8 Q. B. 63.
- 118. n. (h) at end, *insert* Woodcock v. Holdsworth, 16 M. & W. 124.
- 128. n. (r) fifth line, *for* 1 Rowle, *read* 1 Rawle.
- 147. n. (g) at end, *insert* 3 Com. B. 831, S. C.
- 158. second line of § 159, *after* 3 & 4 Will. 4, *insert* c. 42.
- 173. n. (c) *for* R. v. Dilowrth, *read* R. v. Dilworth.
- 225. n. (r) at end, *insert* Richards v. Symonds, 8 Q. B. 90.
- 232. n. (b) at end, *insert* Davis v. Curling, 8 Q. B. 286.
- 278. n. (u) at end, *insert* Naish v. Brown, 2 C. & Kir. 219, per Pollock, C. B.
- 283. n. (n) *for* Park, *read* Parke.
- 311. n. (d) at end, *insert* Ramuz v. Crowe, 1 Ex. R. 167, where held, that drawer could not recover against acceptor on note payable to his order, which he had lost even before indorsement. This case overrules Rolt v. Watson, and modifies the law as stated in the text.
- 319. n. (c) *after* Maule, J., *insert* 3 Com. B. 754, S. C.
- 320. n. (j) at end, *insert* 3 Com. B. 754, S. C.
- 346. second line of text, *after* indictments, *insert* or to criminal informations, R. v. Upton St. Leonard, 17 L. J. (N. S.) M. C. 13.
- 396. sixth line from bottom of text, *for* distinct, *read* district.
- 431. n. (b) at end, *insert* Doe v. Phillips, 8 Q. B. 158.
- 450. n. (g) at end, *insert* Baron de Bode's case, 8 Q. B. 243, 244.
- 481. n. (t) at end, *insert* Freeman v. Tatham, 5 Hare, 329.
- 486. n. (v) *after* McMahon v. Burchell, 2 Phill. 127, 132, 133, *insert* 1 Coop. temp. Cottenham, 475, S. C. and cases cited in note to that report.
- 513. n. (c) at end, *insert* Watson v. King, 3 Com. B. 608.
- 521. n. (i) *after* McGahey v. Alston, *insert* 2.
- 547. n. (m) at end, *insert* King v. Norman, 11 Jurist, C. P. 824, 825.
- 555. n. (z) at end, *insert* Robertson v. Gantlett, 16 M. & W. 289.

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559. n. (f) at end, *insert*, As to the effect of paying money into court, where one count of the declaration is on a bill of exchange, see *Tattersall v. Parkinson*, 11 Jurist, 658.
649. n. (y) for 39 & 40 Geo. 3, c. 39, *read* 39 & 40 Geo. 3, c. 93.
662. n. (m) after *Thomas v. Fredericks*, *insert* 16 L. J., N. S., Q. B. 393.
662. n. (o) at end, *insert* *Paine v. Strand Union*, 8 Q. B. 326.
668. n. (v) at end, *insert* *Burton v. Reeve*, 16 M. & W. 307.
677. n. (b) after *Thomas v. Fredericks*, *insert* 16 L. J., N. S., Q. B. 393.
687. n. (l) *insert*, But if the language of the guarantee leaves it doubtful whether the consideration mentioned therein be a *past* or *present* consideration, parol evidence will be admissible to explain the ambiguity, *Goldshede v. Swan*, 1 Ex. R. 154, and cases there cited.
690. n. (f) for 1 Lev. 1. *read* 3 Lev. 1.
697. n. (f) at end, *insert* *Vaughan v. Hancock*, 3 Com. B. 766.
698. n. (l) at end *insert* *Tempest v. Kilner*, 3 Com. B. 249; *Bowly v. Ball*, id. 284.
708. n. (h) for *Lemaine v. Stanley*, *read* *Lemayne v. Stanley*.
725. n. (e) at end, *insert* Moreover the circumstances must be such as to warrant the jury in inferring a promise to pay, and, therefore, if part-payment be accompanied by a positive refusal to pay the remainder, it will not take the case out of the statute, though the debtor admits that the remainder is due, *Wainman v. Kynman*, 1 Ex. R. 118.
728. n. (z) after the case of *Hartley v. Wharton*, *insert* *Harris v. Wall*, 1 Ex. R. 122.
740. n. (e) at end, *insert* 16 M. & W. 208, S. C.
763. n. (g) at end, *insert* 15 M. & W. 737, S. C.
887. n. (p) at end, *insert* *Walker v. Tilly*, 9 Ir. Eq. R. 261, where held by M. R. that
- the replication must be withdrawn before the plaintiff could examine the defendant.
887. n. (q) at end, *insert* *Dobbyn v. Adams*, 9 Ir. Eq. R. 275.
929. n. (h) at end, *insert* *Att.-Gen. v. Sullivan*, 1 Arm. Mac. & Og. 294, where held by Brady, C. B., that it is not an inflexible rule in Ireland to reject a witness who in a revenue cause has remained in Court, after an order for witnesses to withdraw.
947. n. (j) after 10 Jurist, 217, *insert* 8 Q. B. 208, 250—267, S. C.
968. n. (p) at end, *insert* *Att.-Gen. v. Hitchcock*, 1 Ex. R. 91. That was an information under the revenue laws, and a witness, who had given material evidence for the Crown, was asked, on cross-examination, whether he had not *said* that the officers of the Crown had *offered* him 20*l.* to give that evidence. He denied that he had ever said so, and the Court held that evidence was inadmissible to contradict him. The case deserves an attentive perusal.
1032. n. (d) for *Green v. Weller*, *read* *Green v. Waller*.
1057. n. (h) for *Fuller v. Fitch*, *read* *Fuller v. Fotch*.
1080. first line of § 1191, for requiring, *read* authorising.
1083. first line of text, for require, *read* authorise.
1092. n. (c) for 6 Geo. c. 16, *read* 6 Geo. 4, c. 16.
1113. n. (p) at end, *insert* See *Newton v. Blunt*, 3 Com. B. 675, where two actions having been brought against two joint-contractors, in respect of the same demand, and the debt and costs in one action having been paid, held that a judge at chambers might stay the proceedings in the other action without costs.
1130. n. (m) at end, *insert* *R. v. Leeds*, 17 L. J., N. S., M. C. 1.
1139. n. (u) for *Grant v. M'Lachl*, *read* *Grant v. M'Lachlin*.
1183. n. (h) at end, *insert* *Mollett v. Wackerbarth*, 17 L. J., N. S., C. P. 47.
1195. n. (b) at end, *insert* see *Dyer v. Green*, 1 Ex. R. 71.
1233. one line from bottom, for 721, 72, *read* 721—725.

A

PRACTICAL TREATISE

ON THE

LAW OF EVIDENCE.

PART I.

OF THE NATURE AND PRINCIPLES OF EVIDENCE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 1. THE word EVIDENCE, considered in relation to Law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. This term and the word *proof*, are often used as synonymes; but the latter is applied, by accurate logicians, rather to the *effect* of evidence, than to evidence itself (*a*). None but mathematical truth is susceptible of that high degree of evidence, called *demonstration*, which excludes all possibility of error. In the investigation of matters of fact such evidence cannot be obtained; and the most that can be said is, that there is no reasonable doubt concerning them (*b*). The true question, therefore, in trials of fact, is not, whether it is possible that the testimony may be false, but, whether there is sufficient

(a) See Wills on Circums. Ev. 2; Whately's Logic, B. ii. c. iii. § 1.

(b) See Gambier's Guide to the Study of Moral Ev. 121. Even of mathematical truths this writer justly remarks, that, though capable of demonstration, they are admitted by most men solely on the *moral evidence* of general notoriety. Ib. 196.

probability of its truth ; that is, whether the facts are proved by competent and satisfactory evidence.

§ 2. By *competent evidence*, is meant that which the law requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By *satisfactory evidence*, which is sometimes called *sufficient* evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined ; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of an ordinary man ; and so to convince him, that he would venture to act upon that conviction, in matters of important personal interest (c). Questions respecting the competency or admissibility of evidence, are entirely distinct from those which respect its sufficiency or effect ; the former being exclusively within the province of the Court ; the latter belonging exclusively to the jury (d).

§ 3. This branch of the law may be considered under three general heads, namely, *First*, The Nature and Principles of Evidence ;—*Secondly*, The Object of Evidence, and the Rules which govern its production ;—And *Thirdly*, The Means of Proof, or the Instruments by which facts are established. This order will be followed in the present Treatise ; but before we proceed, it will be convenient, first, to consider what matters the Courts will, of themselves, notice without proof, and next, to offer a few observations respecting the functions of the judge, as distinguished from those of the jury.

(c) 1 St. Ev. 578. *Carpentier's*

(d) 1 Ph. Ev. 2 ; *Carpentier's Co. v. Hayward*, 1 Doug. 375, per Buller, J.

CHAPTER II.

OF MATTERS JUDICIALLY NOTICED, WITHOUT PROOF.

§ 4. ALL civilised nations, being alike members of the great family of sovereignties, may well be supposed to recognise each other's existence, and general public and external relations. Every sovereign therefore recognises, and, of course, the public tribunals and functionaries of every nation notice, the existence and titles of all the other sovereign powers in the civilised world (a). If, however, upon a civil war in any country, one part of the nation should separate from the other, and establish for itself an independent government, the newly formed nation cannot be recognised as such, by the judicial tribunals of other nations, until it has been acknowledged by the sovereign power under which those tribunals are constituted (b). Still the judges are bound, *ex officio*, to know whether or not the government has recognised such nation as an independent state (c).

§ 5. In like manner the judges will recognise, without proof, the

(a) Though no distinct authority can be cited for this proposition, it would probably be considered law at the present day, as falling within the rule, that facts of universal notoriety require no proof. See Gressl. Ev. 294. From *Yrisarri v. Clement*, 11 Moore, 314, 315; 2 C. & P. 225, S.C., it seems that the existence of states unacknowledged by the government must be proved by evidence, showing that they are associations formed for mutual defence, supporting their own independence, making laws, and having courts of justice. The two Reports differ somewhat, but that of Messrs. Carrington and Payne lays down the soundest law. This case is also reported in 3 Bing. 432.

(b) *City of Berne v. Bk. of Eng.*, 9. Ves. 347.

(c) *Taylor v. Barclay*, 2 Sim. 213. In that case it was falsely alleged in the bill, with the view of preventing a demurrer, that Guatemala, a revolted colony of Spain, had been recognised by Great Britain as an independent state; but the Vice-Chancellor took judicial notice that the allegation was false. See, however, *Dolder v. Bk. of Eng.*, 10 Ves. 354, where Lord Eldon observed, "I cannot affect to be ignorant of the fact, that the revolutions in Switzerland have not been recognised by the government of this country; but, as a judge, I cannot take notice of that." It may be well doubted whether this last case is law.

common (*d*) and statute law (*e*), the law of nations, the law and custom of parliament, and the privileges and course of proceedings of each branch of the legislature (*f*); the prerogatives of the Crown (*g*), and the privileges of the royal palaces (*h*); the maritime law (*i*); the ecclesiastical law (*j*); the articles of war, both in the land and marine service (*k*), but not the book called "Rules and Regulations for the Government of the Army" (*l*); royal proclamations, such being acts of state (*m*); the rules of

(*d*) Heineccius ad Pand., L. xxii. t. iii. § 119.

(*e*) *R. v. Sutton*, 4 M. & S. 542. As to private acts of parliament, see 8 & 9 Vict., c. 113, § 3, cited post, § 7.

(*f*) *Lake v. King*, 1 Saund. 131 (*a*); *Stockdale v. Hansard*, 7 C. & P. 731; 9 A. & E. 1, and 2 P. & Dav. 1, S. C.; *Cassidy v. Steuart*, 2 M. & Gr. 437; *Case of the Sheriff of Middlesex*, 11 A. & E. 273.

(*g*) *R. v. Elderton*, 2 Ld. Ray. 980.

(*h*) *Id.* Reported also in 3 Salk. 91, 284; 6 Mod. 73, and Holt 590; *Winter v. Miles*, 10 East, 578; 1 Camp. 475, S.C.; *Att.-Gen. v. Donaldson*, 10 M. & W. 117. Hampton Court has ceased to be a royal palace, *R. v. Ponsonby*, 3 Q. B. 14.

(*i*) *Chandler v. Grieves*, 2 H. Bl. 606 (*n*).

(*j*) 1 Roll. Abr. 526; 6 Vin. Abr. 496. In *Beaurain v. Sir Wm. Scott*, 3 Camp. 388, which was an action on the case for unlawfully excommunicating the plaintiff, the practice of the Ecclesiastical Court appears to have been proved as a matter of fact by witnesses, and to have been left to the jury by Lord Ellenborough.

(*k*) By the 1st section of the Mutiny Act, 10 & 11 Vict., c. 12, the Queen is empowered "to make articles of war for the better government of H.M.'s forces, which articles shall be judicially taken notice of by all judges, and in all courts whatsoever;" and, by the corresponding section of the Marine Mutiny Act, 10 & 11 Vict., c. 13, the Lord High Admiral, or the commissioners for executing his office, "may make, ordain, and establish rules and articles of war under the hand of the said Lord High Admiral, or under the hands of any two or more of the said commissioners, for the better government of H.M.'s royal marine forces and for the punishment of mutiny," &c.; "which rules and articles shall be judicially taken notice of by all judges, and in all courts whatsoever." See also *Bradley v. Arthur*, 4 B. & C. 304, per Abbott, C. J.

(*l*) *Bradley v. Arthur*, 4 B. & C. 304, per Abbott, C. J.

(*m*) There exists some doubt upon this point. In *Dupays v. Shepherd*, 12 Mod. 216, Lord Holt held that a proclamation in print was of as public a nature as a public act of parliament; but in *Van Omeron v. Dowick*, 2 Camp. 44, Lord Ellenborough refused to take notice of a proclamation, on the ground that the Gazette containing it was not produced. The marginal note to this last case is calculated to mislead, as it asserts broadly, that "a judge at Nisi Prius will not take judicial notice of the king's proclamations." The case does not go this length, which is tantamount to saying that royal proclamations must be laid before the jury, but simply decides that when a judge's memory is at fault, some

equity (n); the general practice of conveyancers (o); the custom of merchants (p), at least where such custom has been settled by judicial determinations (q); the special descent of gavelkind and

document must be at hand, which establishes the fact he is called upon to notice. Copies of royal proclamations, if purporting to be printed by the Queen's printer, are now rendered admissible by 8 & 9 Vict., 113, § 3: see post, § 7.

(n) *Elliott v. Evans*, 3 B. & P. 181, per Lord Alvanley; *Maberley v. Robins*, 5 Taunt. 625; 1 Marsh. 258, S. C.; 2 Sugden, V. & P. 202—206.

(o) *Willoughby v. Willoughby*, 1 T. R. 772, per Lord Hardwicke; *Doe v. Hilder*, 2 B. & Al. 793; *Doe v. Plowman*, 2 B. & Ad. 577; *Rowe v. Grenfel*, R. & Moo. 398, per Lord Tenterden. Sir Edward Sugden observes in his *Vend. & Pur.*, Vol. 3, p. 28, "It matters very little what is the opinion of any individual conveyancer; but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their *settled rule of practice* has, accordingly, in several instances been adopted as the *law of the land*, not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice." See also *Howard v. Ducane*, 1 Turn. & R. 86, per Lord Eldon.

(p) *Eriskine v. Murray*, 2 Lord Ray. 1542; *Soper v. Dibble*, 1 Lord Ray. 175; *Carter v. Downish*, Carth. 83; *Williams v. Williams*, id. 269.

(q) *Barnett v. Brandao*, 6 M. & Gr. 630. In that case, where judicial notice was taken by the Court of Exchequer Chamber, of the general lien of bankers on the securities of their customers in their custody, Lord Denman, in pronouncing the judgment of the court, said, "The law-merchant forms a branch of the law of England; and those customs, which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and when so adopted, it is unnecessary to plead and prove them. They are binding on all *without proof*. Accordingly we find that usages affecting bills of exchange and bills of lading, are taken notice of judicially."—P. 665. His lordship then states that, "in the case of a factor, the right to a general lien" is, "in modern practice, treated as a matter of settled law, and no proof is ever required that such general lien exists, as a matter of fact;" and adds, that "the lien of bankers, who are a species of factors in pecuniary transactions, stands on the same footing," and, consequently, their right to such lien "need not be pleaded, but the courts are judicially bound to take notice of it."—P. 666. This lien extends to Exchequer bills.—Id. So in *Edie v. East India Company*, 2 Burr. 1226, which turned upon the question, whether a bill payable to A. or order, and endorsed personally to B., could be afterwards endorsed by B. to another, Mr. J. Wilmot observed, "The custom of merchants is part of the law of England, and courts of law must take notice of it as such. There may, indeed, be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful, and even then the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law."—P. 1228. Lord Mansfield, however, with Denison and Foster, J.'s., rejected the testimony of witnesses to prove the usage, solely on

Brandao v. Brandao
12 C. & F. 787—S. C. B.
S.P.C. reversing
Judg. of Ex. Ch.,
but affirming
that part of it
which related to
judicial notice
of the general lien
of Bankers

borough English lands (*r*), though it seems that all other customs incident to such tenures must be specially pleaded and proved (*s*); the customs of London which have been certified by the recorder (*t*), such as the custom of foreign attachment (*u*)—the custom that every shop is a market overt for goods of the same kind as are usually sold there (*v*)—the custom that married women may be sole traders (*w*), and the custom which regulates the distribution of the property of a freeman dying intestate among his orphan children (*x*); the custom or law of the road, viz., that horses and carriages should respectively keep on the left side (*y*); and all particular customs which have been tried, determined, and

the ground that the question had *already* been *solemnly settled* by two adjudications in the courts of law. See pp. 1224—1226.

(*r*) 1 Bl. Com. 76; *Doe v. Scudamore*, 2 Lord Ray. 1025; Co. Lit. 175 *b*; *Crosby v. Hetherington*, 4 M. & Gr. 946, per Tindal, C. J.

(*s*) Co. Lit. 175 *b*, n. 4; *Robinson on Gavel*. 41.

(*t*) *Crosby v. Hetherington*, 4 M. & Gr. 933, 946; *Bruin v. Knott*, 12 Sim. 452—456; *Blacquiére v. Hawkins*, 1 Doug. 380, per Lord Mansfield. But uncertified customs must be proved in Westminster Hall, though they will be judicially noticed in the City Court. *Stainton and Wife v. Jones*, id., note 96, per Lord Mansfield. So also the Court of Queen's Bench in Ireland, will not judicially notice a custom of the Lord Mayor and Sheriffs' Court in Dublin, unless certified by the recorder. *Simmonds v. Andrews*, 1 Jebb and Symes, 531.

(*u*) Certified by Starkey in 22 Ed. 4. See 1 Roll. Abr. 554 (K) 5; *Bruce v. Wait*, 1 M. & Gr. 39; *Crosby v. Hetherington*, 4 M. & Gr. 933.

(*v*) Certified by Sir E. Coke, 5 Rep. 83 *b*; S.C., rather more at length, as *L'Evesque de Worcester's case*, Moore, 360; S.C. Poph. 84. See also *Lyons v. De Pass*, 11 A. & E. 326; and 9 C. & P. 68, S.C., where the custom was held to apply, though the premises were described in evidence as a warehouse, and were not sufficiently open to the street for a person on the outside to see what passed within.

(*w*) *Lavie v. Phillips*, 3 Burr. 1776. Other local customs, as that of carting whores, in London, or that of foreign attachment in Bristol, Liverpool, and Chester, are noticed in the respective city courts, 1 Doug. 380 *n*, 96, and therefore need not be set out on the record. In such cases, if the judgment of the court below is brought before a court of error, such court will also judicially notice the existence of the custom. See *Bruce v. Wait*, 1 M. & Gr. 24, 41, note *a*.

(*x*) *Bruin v. Knott*, 12 Sim. 452, 453.

(*y*) This rule has been repeatedly recognised by judges at *Nisi Prius*, in actions for negligent driving and riding. See *Leame v. Bray*, 3 East, 593, as to carriages, and *Turley v. Thomas*, 8 C. & P. 104, per Coleridge, J., as to saddle horses. The rule of the river, that if a light vessel is going free, and a loaded vessel is coming close-hauled to the wind, it is the duty of the light vessel to bear away, and to let the loaded vessel keep her course, though admitted by sailors in navigating the

recorded in the same court (z). But no judicial notice can be taken of the laws, usages, or customs of a foreign state; and so strictly is this rule enforced, that the laws of the colonies, and even the laws of Scotland, must be proved as facts (a). As the laws of Ireland are substantially the same as those of England, except so far as they are varied by statute, it is apprehended that no proof respecting them would be required; and in accordance with this view, one of our ablest judges has recently suggested, that the courts at Westminster would judicially recognise the fact, that an action must be commenced by *process* in Ireland (b).

§ 6. The courts will also judicially notice the following seals:—the Great Seal (c); the Queen's Privy Seal (d); the seals of the superior courts of justice (e); of the grand sessions in Wales (f),

Thames, has not yet been judicially recognised. See *Sills v. Brown*, 9 C. & P. 602. With respect to steam-vessels, the act of 9 & 10 Vict., c. 100, § 9, enacts, "that every steam-vessel, when meeting or passing any other steam-vessel, shall pass as far as may be safe on the port side of such other vessel; and every steam-vessel navigating any river or narrow channel, shall keep as far as is practicable to that side of the fairway or mid-channel of such river or channel which lies on the starboard side of such vessel; due regard being had to the tide, and to the position of each vessel in such tide;" and the master shall be liable to a penalty not exceeding 50*l.* for neglecting these regulations. § 13 further enacts, that "if any damage to any person or property shall be sustained in consequence of" neglecting these regulations, "the same shall, in all courts of justice, be deemed, in the absence of proof to the contrary, to have been occasioned by the wilful default of the master, or other person having the charge of such steam-vessel, and such master or other person shall be subject in all proceedings, whether civil or criminal, to the legal consequences of such wilful default." See also § 12, as to exhibiting lights.

(z) Dr. & St. 34; 1 Bl. Com. 76.

(a) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 54; *Mostyn v. Fabrigas*, 1 Cowp. 174, per Lord Mansfield; *Sussex Peer. case*, 11 Cl. & Fin. 114—117; *Male v. Roberts*, 3 Esp. 163, per Lord Eldon; *Woodham v. Edwards*, 5 A. & E. 771; 1 N. & P. 207, S.C.; *Wey v. Yally*, 6 Mod. 194; *Story, Conf. of Laws*, § 637, and cases cited in note.

(b) *Reynolds v. Fenton*, 16 Law J. (N.S.) C.P. 16, per Maule, J., explaining *Ferguson v. Mahon*, 11 A. & E. 179; 3 P. & D. 143, S.C.

(c) Lord Melville's case, 29 How. St. Tr. 707.

(d) *Foggassa's case*, 24 Edw. 3, 23, cited in *Olive v. Guin*, 2 Sid. 146.

(e) *Tooker v. Duke of Beaufort*, Say. 297.

(f) *Olive v. Guin*, 2 Sid. 146, 6; *Hardr.* 118, S.C.

now abolished; of the High Court of Admiralty (*g*); of the Prerogative Court of Canterbury (*h*), and of the court of the Vice Warden of the Stannaries (*i*); the seals of all courts constituted by Act of Parliament, if seals are given to them by the act (*j*), and therefore the seals of the Insolvent Debtors' Court (*k*), the Court of Bankruptcy (*l*), and the local courts for the recovery of small debts (*m*). They will also judicially notice the seal of the corporation of London (*n*), and the seal of a notary-public, he being an officer recognised by the whole commercial world (*o*). Several other seals are rendered admissible in evidence, without proof of their genuineness, by the express language of particular statutes; and among them may be noticed the seal of

(*g*) *Green v. Waller*, 2 Lord Raym. 893.

(*h*) *Kempton v. Cross*, Rep. tem. Hardw. 108.

(*i*) 6 & 7 Will. 4, c. 106, § 19.

(*j*) *Doe v. Edwards*, 1 P. & Dav. 408; 9 A. & E. 554, S.C.

(*k*) *Id.* This case was decided on the 76th section of the act of 7 Geo. 4, c. 57, which enacts that copies of the petition, schedule, and other proceedings in the Insolvent Debtors' Court, *purporting* to be signed by the officer, &c., "and sealed with the seal of the said court," shall be admitted "without any proof whatever given of the same, further than that the same *is sealed* with the seal of the said court." It applies, therefore, *à fortiori*, to the 19th section of the same act, which provides that assignments to and by provisional assignees shall be filed of record, and that copies of such records, *purporting* to have the certificate of the provisional assignee, or his deputy, endorsed thereon, "and *to be sealed* with the seal of the said court," shall be evidence; and also to the act of 1 & 2 Vict., c. 110, §§ 46, 105, which enacts, that copies of the proceedings shall be evidence, so far as this requisite is concerned, simply on their "purporting to be sealed with the seal of the said court." See also 5 & 6 Vict., c. 116, § 11.

(*l*) 1 & 2 Will. 4, c. 56, § 28; 2 & 3 Will. 4, c. 114, § 9, which last act provides, that "upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, *purporting to be sealed* with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and *purporting to be sealed* as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof." See 5 & 6 Vict., c. 122, §§ 25, 37, 39, 42, and 43; and 8 & 9 Vict., c. 113, cited post, § 7.

(*m*) 9 & 10 Vict., c. 95, §§ 3, 57, and 111.

(*n*) *Doe v. Mason*, 1 Esp. 53, per Lord Kenyon.

(*o*) *Anon.*, 12 Mod. 345; *Bayley on Bills*, 487. See also 6 Geo. 4, c. 16, § 124; *Hutcheon v. Mannington*, 6 Ves. 823; and *Furnell v. Stackpoole*, Milw. Eccl. Ir. R. temp. Radcliffe, 485, 486.

the board of poor law commissioners (*p*); of the general register office (*q*); of the office of the registrar of designs for articles of manufacture (*r*); and of the record office (*s*).

§ 7. The principle recognised by these acts having been found in practice to be productive of highly beneficial results, it has been recently extended to a numerous class of cases by the Documentary Evidence Act (*t*). This statute, after reciting that—
“Whereas it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes: And whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and it is expedient to facilitate the admis-

(*p*) 4 & 5 Will. 4, c. 76, § 3, enacts, that “all rules, orders, and regulations made by the commissioners in pursuance of that act, or copies thereof, purporting to be sealed or stamped with the seal of the said board, shall be received as evidence of the same respectively, without any further proof thereof; and no such rule, order, or regulation, or copy thereof, shall be valid, or have any force or effect, unless the same shall be sealed or stamped as aforesaid.” *See 10 & 11 Vict. c. 119, § 5; 18 & 19 Vict. c. 86, § 17, &c.; 48 & 49 Vict. c. 70, § 3, &c.*

(*q*) 6 & 7 Will. 4, c. 86, § 38. “All certified copies of entries, purporting to be sealed or stamped with the seal of the said register-office, shall be received as evidence.” See 3 & 4 Vict., c. 92, § 9.

(*r*) 5 & 6 Vict., c. 100, § 16; and 6 & 7 Vict., c. 65, §§ 6, 7.

(*s*) 1 & 2 Vict., c. 94, § 11, enacts, that a seal shall be provided; § 12 enacts, that copies of the records shall be examined and certified as true and authentic copies, by the deputy-keeper of the records, or one of the assistant record-keepers, and shall be sealed or stamped with the seal of the record office; § 13 enacts, that such copies, “certified as aforesaid, and *purporting to be sealed or stamped* with the seal of the record office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, *without any further or other proof thereof*, in every case in which the original record could have been received there as evidence.”

(*t*) 8 & 9 Vict., c. 113. The author of the present work naturally feels some satisfaction in referring to this statute, as he originally suggested to the Law Amendment Society the alterations embodied therein, and afterwards prepared the bill, which, under the protection of Lord Brougham, finally obtained the sanction of the legislature.

sion in evidence of such and the like documents:" enacts, "That whenever *by any act now in force or hereafter to be in force*, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively *purport* to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence" (u).

Sect. 2 enacts, "That all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take *judicial notice* of the signature of any of the equity or common law Judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

Sect. 3 enacts, "That all copies of private and local and personal acts of parliament not public acts, if *purporting* to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, *purporting* to be printed by the printers to the crown or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and

(u) The words after the last comma were introduced into the act while passing through the House of Commons. They appear to have been copied from the act of 1 & 2 Vict., c. 94, § 13 (see § 6, *ante*, note s), by some honourable member, who did not know distinctly what he was about.

others, without any proof being given that such copies were so printed."

Sect. 4 provides, "That if any person shall forge the seal, stamp, or signature of any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or of any certified copy of any document, bye-law, entry in any register or other book, or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of or relating to any corporation or company already established, or to any corporation or company to be hereafter established, or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate, or other judicial or official document, or shall tender in evidence any order, decree, certificate, or other judicial or official document with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit, or if any person shall print any copy of any private act or of the journals of either House of Parliament (v), which copy shall falsely purport to have been printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not more than three nor less than one year, with hard labour: PROVIDED ALSO, that whenever any such document as before mentioned shall have been received in evidence by virtue of this act, the court, judge, commissioner, or other

(v) The words, "or of any royal proclamation," appear to have been accidentally omitted. They were introduced into the original draft of the bill.

person officiating judicially who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised, *at its or at his own discretion*, to direct that the same shall be *impounded*, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the persons or person who constituted such court, or by some one of the equity or common law Judges of the superior courts at Westminster, on application being made for that purpose."

Sect. 5 enacts, "That this act shall not extend to *Scotland*" (*w*).

§ 8. A somewhat nice question respecting the meaning of the word "journals," as used in the third section of this act, has recently been raised in a case at Nisi Prius (*x*). An action for work and labour was brought by an engineer against the director of a railway company, and the defence was, that the plans and sections deposited by the plaintiff had not been drawn in accordance with the Standing Orders of the House of Commons, and that, consequently, the work was valueless. In order to establish this case, it became necessary to prove the Standing Orders, and with this view, the defendant's counsel tendered in evidence a book, which purported to contain the Standing Orders of the House of Commons from 1685 to 1846 inclusive, and to be printed and published by Luke James Hansard, by permission of the Right Hon. Charles Shaw Lefevre, Speaker. The Court was then called upon to take judicial notice, that these orders were the resolutions of the House, and as such were entered on their journals; and it was argued, that the book produced being a copy of *extracts* from these journals, must be regarded in the same light as a copy of the entire journals; that the act, if reasonably

(*w*) §§ 6 & 7 are merely formal and immaterial.

(*x*) *Pritchard v. Black*, 21st June, 1847; Ex., coram Platt, B., MS. It is a pity that Mr. Hansard, in publishing the Standing Orders and other documents of the House of Commons, does not state in the title-page his official character. The Standing Orders of the Lords purport to be "printed by Geo. E. Eyre and Wm. Spottiswoode, Printers to the Queen's Most Excellent Majesty."

construed, must apply to a copy of a part of the journals as well as to a copy of the whole; and that, although it did not directly appear that Mr. Hansard was the printer to the House of Commons, yet this fact might fairly be inferred from the statement that the book was printed by the permission of the Speaker. Mr. Baron Platt intimated an opinion, that the evidence was not admissible, but it became unnecessary expressly to decide the point, as the counsel for the plaintiff waived his objection, and the book was put in by consent.

§ 9. With regard to the first section of the act, it may well be doubted whether the language there employed would be held to apply to apothecaries' certificates. Under the act of 55 Geo. 3, c. 194, § 21, an apothecary not in practice on, or prior to, the 1st of August, 1815, cannot recover the amount of his bill, unless he can prove at the trial, that he has obtained a certificate to practise from the Society of Apothecaries. The act is silent as to the mode of proving this certificate, but it seems that at common law the document may be authenticated, either by proving the corporate seal, if such were attached to it (*y*), or by proving the handwriting of the examiners, or of some of them, if their signatures alone were appended (*z*). Then came the act of 6 Geo. 4, c. 133, which by § 7 enacted, that the common seal of the Society should be deemed sufficient proof of the authenticity of the certificate to which it was affixed. The intention of the legislature in passing this act obviously was, that no other proof should be required than the production of the certificate; but by the omission of the word "purporting," the language used became illusory (*a*). Still, if the act were now in force, a certificate purporting to bear the seal of the Society would unquestionably be admissible under the Documentary Evidence Act. Unfortunately, however, the act of 6 Geo. 4, was merely a temporary one, which was allowed to expire on the 1st of August, 1826 (*b*); and consequently, as the 55 Geo. 3, c. 194, is the only statute now in force, and that act does not

(*y*) *Steavenson v. Oliver*, 8 M. & W. 242, per Parke, B.

(*z*) *Walmsley v. Abbott*, 3 B. & C. 218.

(*a*) *Steavenson v. Oliver*, 8 M. & W. 242; *Chadwick v. Bunning, Ry. & M.* 306; 2 C. & P. 106, S.C.

(*b*) § 11.

require, or *direct*, that the certificate should be sealed or signed in any particular manner, it would seem that the certificate is not such a document as would fall within the purview of 8 & 9 Vict., c. 113, at least if it were granted subsequently to the 1st of August, 1826 (*c*). If, indeed, the certificate bore date prior to that day, and purported to be sealed with the seal of the Society, it might then, perhaps, be admissible without proving the genuineness of the seal; for the judges seem to have considered, that the act of 6 Geo. 4 was not in all respects a temporary statute, but that those parts of it which explain the provisions of the 55 Geo. 3, were in their own nature permanent, so far as related to any rights acquired under them (*d*).

§ 10. As the Documentary Evidence Act does not extend to Scotland, proof must still be given of the seal of the University of St. Andrews (*e*); and it appears also, that the stamp usually impressed by the judge's clerk on documents relating to proceedings at chambers (*f*); the seals of all corporations, excepting that of the City of London (*g*), and those rendered admissible by statute; the seals of foreign courts (*h*); the seals of our colonial courts, and even the great seals of the colonies (*i*), require proof. So, also, the seals of our courts must be proved in India or in the colonies (*j*). It seems that, in America, the seals of foreign states, as being the usual and appropriate symbols of nationality and sovereignty, are judicially noticed; and all public acts, laws, decrees and judgments, purporting to be exemplified under these

(*c*) See observations on this subject in No. 9 of N. S. of Law Mag. 285—287.

(*d*) *Steavenson v. Oliver*, 8 M. & W. 234, 242—244.

(*e*) *Collins v. Carnegie*, 1 A. & E. 695.

(*f*) *Barrett Navigation Co. v. Shower*, 8 Dowl. 173. It is now highly expedient that the judge's clerk should discontinue this practice of stamping, and that the judge himself should sign the documents.

(*g*) *Moises v. Thornton*, 8 T. R. 307; *Doe v. Mason*, 1 Esp. 53. In *Cooch v. Goodman*, 2 Q. B. 580, which was an action on covenant, it appeared on record that the demise was by a corporation; and the court held that it could not judicially notice that no such corporation existed, though this fact was admitted in argument by both sides.

(*h*) Story, Conf. of Laws, § 643.

(*i*) *Henry v. Adey*, 3 East, 221, as to the seal of the island of Grenada; *Buchanan v. Rucker*, 1 Camp. 63; 9 East, 192, S. C. as to that of Tobago.

(*j*) *Clark v. Mullick*, 3 Moore P. C. R. 252, 280.

seals, are there received as genuine (*k*). In England, however this liberal doctrine has not yet been promulgated from the bench (*l*); and it may well be doubted whether it would here be allowed to prevail, since, as we have just seen, even the broad seals of our own colonies must be proved to be authentic.

§ 11. The Americans also admit an exception in favour of the seals of foreign Courts of Admiralty, on the ground that such seals belong to Courts of the Law of Nations (*m*). Whether the English judges would adopt this rule to its full extent is doubtful, although, on one occasion (*n*), Lord Hale appears to have admitted a sentence of the Admiralty of France exemplified under the seal of that court. Perhaps, however, in that case the seal was first proved. In America, the signature of the Chief of the Executive of the state is recognised, without proof, as genuine (*o*); and so, in Louisiana, are also the signatures of executive and judicial officers to all official acts (*p*). The English doctrine certainly does not extend this length, though it is difficult to define its exact limits. On the one hand, we have seen that the signatures of the superior equity and common law judges must be judicially noticed, if appended to any judicial or official document (*q*), and that many other signatures, attached to documents, which are rendered admissible by statutes, need not be proved (*r*); and it seems also, that, in practice, no proof is required of the handwriting of the keeper, or of the deputy-keeper, of the Queen's Prison (*s*). On the other

(*k*) Story, *Confl. of Laws*, § 643; *Church v. Hubbard*, 2 Cranch, 238; *Griswold v. Pitcairn*, 2 Conn. 85, 90; *U. S. v. Johns*, 4 Dall. 416; *Lincoln v. Battelle*, 6 Wend. 475.

(*l*) In an old case reported as *Anon.* in 9 Mod. 66, an exemplification of a sentence in Holland under the common seal of the States was admitted; but it does not appear whether or not the authenticity of the seal was first proved.

(*m*) Story, *Confl. of Laws*, § 643. See *Yeaton v. Fry*, 5 Cranch, 335; *Thompson v. Stewart*, 3 Conn. 171, 181.

(*n*) *Hughes v. Cornelius*, cited by Lord Holt in *Green v. Waller*, 2 Lord Raym. 893: and reported 2 Shower, 232, and 2 Smith's Lead. C. 434.

(*o*) *Jones v. Gale's Exors.*, 4 Martin, 635.

(*p*) *Id.*; *Wood v. Fitz*, 10 Martin, 196.

(*q*) 8 & 9 Vict. c. 113, § 2, *ante*, § 7.

(*r*) *Id.* § 1, *ante*, § 7. A partial list of the more important of these documents will be given in the chapter on Public Documents, *post*.

(*s*) *Alcock v. Whatmore*, 8 Dowl. 615; *Short v. Williams*, 4 Dowl. 357; *Fogarty v. Smith*, *id.* 598, *n.*; 5 & 6 Vict. c. 22.

hand, it appears highly probable that the courts would not recognise the signatures of the Lords of the Treasury to their official letters (*t*); and it is even a matter of some doubt whether the royal sign-manual will be judicially noticed. On one occasion (*u*), before the House of Peers, a warrant purporting to be so signed was admitted without proof, but as the party putting in this document was prepared to prove it if necessary, the acquiescence of the opposite counsel amounts to little. In another case (*v*), the judges decided that the King's sign-manual was admissible to show his Majesty's intention of pardoning a prisoner; and in a third case (*w*), the sign-manual was actually produced for this very purpose; but on neither of these occasions was any question raised as to the necessity of proving the signature to be genuine.

§ 12. It seems that the judges will take notice of the *London Gazette* on its mere production, and that it is unnecessary to prove that it was bought at the office of the Queen's printer, or to offer any evidence as to whence it came (*x*).

§ 13. It is unnecessary to prove facts, which may certainly be known from the invariable course of nature; such as that a man is not the father of a child, where non-access is already proved until within a fortnight of the woman's delivery (*y*); neither is it necessary to prove the course of time, or of the heavenly bodies; nor the ordinary public fasts and festivals (*z*); nor the commencement or ending of the legal terms (*a*), nor the coincidence of the years of the reign of any sovereign of this country, with the years of our Lord (*b*); nor the coincidence of days of the week with days of the month (*c*); nor the order of the months (*d*); nor the

(*t*) *R. v. Jones*, 2 Camp. 131, per Lord Ellenborough.

(*u*) Lord Melville's case, 29 How. St. Tr. 706.

(*v*) *R. v. Miller*, 2 W. Bl. 797; 1 Lea. C. C. 74, S. C.

(*w*) *R. v. Gully*, 1 Lea. C. C. 98.

(*x*) *R. v. Forsyth*, R. & R. 274.

(*y*) *R. v. Luffe*, 8 East, 202.

(*z*) 6 Vin. Abr. 492, pl. 8—14.

(*a*) 6 Vin. Abr. 490, pl. 32.

(*b*) *Holman v. Burrow*, 2 Lord Raym. 795; *R. v. Pringle*, 2 M. & Rob. 276.

(*c*) 6 Vin. Abr. 492, pl. 6, 7, 8; *Hoyle v. Lord Cornwallis*, 1 Stra. 387; *Page v. Faucet*, Cro. Eliz. 227; *Harry v. Broad*, 2 Salk. 626; *Brough v. Parkings*, 2 Lord Raym. 994, per Lord Holt. Thus the court is bound judicially to notice what days of the month fall on Sundays, *Hanson v. Shackelton*, 4 Dowl. 48; *Pearson v. Shaw*, 7 Ir. Law R. 1.

(*d*) *R. v. Brown*, M. & M. 164.

meaning of words in the vernacular language (*e*); nor the legal weights and measures (*f*); nor the value of the coin of the realm (*g*); nor, it seems, any matters of public history, affecting the whole people (*h*).

§ 14. Courts also notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government (*i*);

(*e*) *Clementi v. Golding*, 2 Camp. 25, as to the meaning of the word "book;" *Commonwealth v. Kneeland*, 20 Pick. 239; 6 Vin. Abr. 491, 492, pl. 6, 7; *R. v. Woodward*, 1 Moody, C. C. 323. In that case the prisoner was indicted under 7 & 8 Geo. 4, c. 30, § 17, which makes it a felony maliciously to burn any stack of *pulse*, for setting fire to a stack of *beans*, and the judges unanimously held that they were bound to notice that beans were a species of pulse. So in *R. v. Swatkins*, 4 C. & P. 548, Patteson, J., after conferring with Bosanquet, J., judicially noticed that *barley* was *corn*, in an indictment for arson under the Act just mentioned. In *R. v. Beaney*, R. & R. 416, however, the judges refused to notice that a colt was an animal of the horse species. There the indictment charged the prisoner with stealing two colts. By the Acts of 1 Edw. 6, c. 12, § 10, & 2 Edw. 6, c. 33, the benefit of clergy was taken away from persons stealing "horses, geldings, or mares;" and as these Acts did not mention colts *eo nomine*, the prisoner was merely convicted of simple larceny. (*f*) *Hockin v. Cooke*, 4 T. R. 314.

(*g*) *Glossop v. Jacob*, 1 Stark. R. 69; *Kearney v. King*, 2 B. & Al. 301.

(*h*) *Bk. of Augusta v. Earle*, 13 Pet. 590.

(*i*) See 6 & 7 Vict. c. 94, which, after reciting that "by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions: and whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm; and it is expedient that such doubts should be removed:" enacts, that "it is and shall be lawful for Her Majesty to hold, exercise, and enjoy any power or jurisdiction, which Her Majesty now hath, or may at any time hereafter have, within any country or place out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory."

Sect. 2 enacts "that every act, matter, and thing which may at any time be done, in pursuance of any such power or jurisdiction of Her Majesty, in any country or place out of Her Majesty's dominions, shall, in all courts ecclesiastical and temporal, and elsewhere within Her Majesty's dominions, be and be deemed and adjudged to be, in all cases, and to all intents and purposes whatsoever, as valid and effectual as though the same had been done according to the local law then in force within such country or place."

Sect. 3 enacts, "that if in any suit or other proceedings, whether civil or criminal, in any court ecclesiastical or temporal within Her Majesty's dominions, any issue or question of law or of fact shall arise, for the due determination whereof it shall, in the opinion of the judge or judges of such court, be necessary to produce evidence of the existence of any such power or jurisdiction as aforesaid, or of the

and the local divisions of their country, as into states (*j*), provinces (*k*), counties (*l*), cities, towns, parishes, and the like, so far as political government is concerned or affected; but not the relative positions of such local dominions, nor their precise boundaries, further than they may be described in public statutes (*m*). Thus the courts refused to say, judicially, that "a part of the coast called Suffolk" was not in Kent, or that "Orfordness, in the county of Suffolk," was not situated between the North Foreland and Beachy-Head (*n*). Neither will they notice that a particular place is within a certain city (*o*); nor that a particular town is within a certain diocese (*p*); nor that a street mentioned in the pleadings is a public thoroughfare, though the word "street," *via strata*, would rather imply that it was (*q*); nor that a particular street is not in a certain county, though it be notorious that a street bearing the same name is in another county (*r*); nor that a city mentioned in a document is in a particular country, even though it appear that one with a similar name is the capital of such country (*s*).

extent thereof, it shall be lawful for the judge or judges of any such court, and he or they are hereby authorised to transmit, under his or their hand and seal or hands and seals, to one of Her Majesty's principal secretaries of state, questions by him or them properly framed respecting such of the matters aforesaid as it may be necessary to ascertain in order to the due determination of any such issue or question as aforesaid; and such secretary of state is hereby empowered and required, within a reasonable time in that behalf, to cause proper and sufficient answers to be returned to all such questions, and to be directed to the said judge or judges, or their successors; and such answers shall, *upon production thereof, be final and conclusive evidence*, in such suit or other proceedings, of the several matters therein contained and required to be ascertained thereby."

(*j*) *Whyte v. Rose*, 4 P. & D. 199; 3 Q. B. 495, S. C. There the court noticed, that by "the Kingdom of Ireland" was meant that part of the United Kingdom called Ireland. (*k*) *Id.* (*l*) *Deybel's case*, 4 B. & Al. 242.

(*m*) *Id.*; 2 Inst. 557; *Fazakerley v. Wiltshire*, 1 Str. 469; *R. v. Burrigge*, 3 P. Wms. 497; *Thorne v. Jackson*, 16 Law, J. (N. S.) C. P. 87. *3 C. & D. 661. P.C.*

(*n*) *Deybel's case*, 4 B. & Al. 243.

(*o*) *Brune v. Thompson*, 2 Q. B. 789, in which case the plaintiff was non-suited for not proving that the Tower of London was within the City of London.

(*p*) *R. v. Simpson*, Lord Raym. 1379.

(*q*) *Grant v. Moser*, 5 M. & Gr. 129; per Tindal, C. J.

(*r*) *Humphreys v. Budd*, 9 Dowl. 1000. See also *Thorne v. Jackson*, 16 Law, J. (N.S.) C. P. 87. *3 C. & D. 661. P.C.*

(*s*) *Kearney v. King*, 2 B. & Al. 301. There the declaration was on a bill

§ 15. But the courts will judicially recognise the political constitution or frame of their own government; its essential political agents or public officers, sharing in its regular administration; and its essential and regular political operations and actions. Thus notice is taken, by all tribunals, of the accession and demise of the sovereign (*t*); the heads of departments, and principal officers of state (*u*); marshals and sheriffs (*v*), but not their deputies; also the existence of a war in which their own country is engaged, at least when such war is recognised in public proclamations or Acts of Parliament (*w*); also the days of special public fasts and thanksgivings, when recognised in like manner; the stated days of general political elections; the date and place of the sittings of the legislature (*x*); and, in short, to borrow the language of the Vice-Chancellor in *Taylor v. Barclay*, "all public matters which affect the government of the country" (*y*). But they will not recognise private orders made at the council table (*z*), for these are matters of particular concernment; nor, it seems, any orders of council, even though they regard the Crown and the government (*a*); nor the transactions on the Journals of either House of Parliament (*b*).

§ 16. Lastly, all courts are bound judicially to notice their own rules and course of proceeding (*c*); also the customs of the

drawn and accepted at Dublin, to wit, at Westminster, for 542*l*. The court held that upon this declaration, the bill must be taken to have been drawn in England for English money, and, therefore, that proof of a bill drawn at Dublin in Ireland for Irish money, which is of less value, was a fatal variance.

(*t*) *Holman v. Burrow*, 2 Lord Raym. 794; *R. v. Pringle*, 2 M. & Rob. 276.

(*u*) *R. v. Jones*, 2 Camp. 131; *Bennett v. The State of Tennessee*, Mart. & Yerg. R. 133.

(*v*) See *Grant v. Bagge*, 3 East, 128.

(*w*) *Dolder v. Lord Huntingfield*, 11 Ves. 292; *R. v. De Berenger*, 3 M. & Sel. 67. It seems that when war is neither publicly proclaimed, nor noticed in any statute, the question of its existence is one solely for the jury. 1 Hale, P. C. 164; *Foster's Disc.* 1, c. 2, § 12; and the existence of war between foreign countries will not be judicially noticed; *Dolder v. Lord Huntingfield*, 11 Ves. 292, per Lord Eldon.

(*x*) *R. v. Wilde*, 1 Lev. 396; 1 Doug. 97. n. (41); *Birt v. Rothwell*, 1 Lord Raym. 210, 343.

(*y*) 2 Sim. 221.

(*z*) 6 Vin. Abr. 490.

(*a*) *Att.-Gen. v. Theakstone*, 8 Price, 89.

(*b*) *R. v. Knollys*, 1 Lord Raym. 10, 15. Copies of the Journals are now admissible if purporting to be printed by the official printers, 8 & 9 Vict. c. 113, § 3, cited ante § 7.

(*c*) *Dobson v. Bell*, 2 Lev. 176; *Pugh v. Robinson*, 1 T. R. 118.

other superior Common Law Courts at Westminster (*d*) ; the limits of their jurisdiction (*e*), and the privileges of their officers (*f*) and attornies (*g*) ; the power of the Courts of Equity, and the authority of the Master of the Rolls (*h*) ; the existence of Courts of General Jurisdiction (*i*) ; and the powers of the Ecclesiastical Courts, and the limits of their jurisdiction ; as, for instance, that a judgment in the Court of Queen's Bench is not within the jurisdiction of the Archdeacon of Dorset (*j*), and that the Archbishop of Canterbury has so far jurisdiction over the *bona notabilia* of an intestate British subject, whether situated in Ireland, the colonies, or any foreign country, that he may grant letters to administer such personal property, and, indeed, must do so before the administrator can sue in any English court, whether of law or equity, in respect thereof (*k*). So the courts will recognise the rules, orders, and regulations made by the Poor-law Commissioners under the authority of the Act of 4 & 5 Will. 4, c. 76, for these are constituted by the 42d sect. as binding as if embodied in that Act ; and the latter statute of 7 & 8 Vict., c. 101, expressly provides, by the 71st sect. that "any copy of such rule, order, or regulation, printed by the printer duly authorised by the 'Crown,' shall be received in evidence, and judicially taken notice of, and shall, until the contrary be shown, be deemed sufficient proof that such order was duly made and is in force." It would seem, however, from the careless wording of this last Act, to be still necessary to prove that the paper offered in evidence was really printed by the Queen's printer ; and this defect is not remedied by the recent Act of 8 & 9 Vict., c. 113.

§ 17. On the other hand, the Common Law Courts at West-

(*d*) Lane's case, 2 Rep. 16, b ; Worlich v. Massy, Cro. Jac. 67 ; Mounson v. Bourn, Cro. Car. 518, 526. (e) Doe v. Caperton, 9 C. & P. 116.

(*f*) Ogle v. Norcliffe, 2 Lord Raym. 869.

(*g*) Stokes v. Mason, 9 East, 426 ; Chatland v. Thornley, 12 East, 544 ; Hunter v. Neck, 3 M. & Gr. 181 ; 3 Scott, N. R. 448, S. C. ; Walford v. Fleetwood, 14 M. & W. 449. (h) In re Clarke, 2 Q. B. 619.

(*i*) Tregany v. Fletcher, 1 Lord Raym. 154.

(*j*) Adams v. Terretenants of Savage, 2 Lord Raym. 856.

(*k*) Whyte v. Rose, 3 Q. B. 493, per Ex. Ch. overruling a judgment of the Queen's Bench, reported id., and 4 P. & Dav. 204.

minster will not take judicial notice of the practice of the Court of Chancery (*l*), or of the offices of that court (*m*), or of the Ecclesiastical Courts (*n*), or of the Courts of Bankruptcy (*o*), or even of the Court of Review (*p*); though this last court has all the powers and privileges of the superior courts at Westminster expressly conferred upon it by statute (*q*).

§ 18. It does not seem perfectly clear, whether or not the judges of one of the superior courts are bound to notice who are the judges in the other superior courts. In an old case (*r*) it was objected that they were not; but, though reported by Strange, as well as Andrews, it does not appear from either report whether the decision turned on that, or on another exception that was taken. Probably, at the present day the question would be answered in the affirmative, on the ground that the appointment of the judges is a fact of general notoriety, and as, moreover, their signatures when attached to judicial or official documents must be now judicially noticed (*s*). The weight of American authorities is in favour of recognising the justices of even the inferior tribunals (*t*); but this doctrine certainly does not prevail in England, as the Court of Queen's Bench has refused to notice who is the judge of the Court of Review (*u*). With regard to inferior courts of limited jurisdiction, the superior courts will not take cognizance of the customs and proceedings therein (*v*), unless when called upon to review their judgment upon a writ of error (*w*).

(*l*) *Dicas v. Lord Brougham*, 1 M. & Rob. 309; recognised in *R. v. Koops*, 6 A. & E. 202, per Lord Denman; *Tucker v. Inman*, 4 M. & Gr. 1049, 1063.

(*m*) *Worsley v. Filisker*, 2 Roll. R. 119; *Doe v. Lloyd*, 1 M. & Gr. 685.

(*n*) *Beaurain v. Sir W. Scott*, 3 Camp. 388.

(*o*) *Turquand v. Booth*, sittings after H. T. 1844. London, per Patteson, J., MS.

(*p*) *Van Sandau v. Turner*, 6 Q. B. 773. (*q*) 1 & 2 Will. 4., c. 56, § 1.

(*r*) *Skipper v. Hooke*, 2 Stra. 1080; Andr. 74. *ex relatione alterius*, S. C.

(*s*) 8 & 9 Vict. c. 113, § 2, cited ante, § 7.

(*t*) *Hawks v. Kennebec*, 7 Mass. 461; *Ripley v. Warren*, 2 Pick. 592; *Despau v. Swindler*, 3 Mart. N. S. 705. (*u*) *Van Sandau v. Turner*, 6 Q. B. 773, 786.

(*v*) *R. v. U. of Cambridge*, 2 Lord Raym. 1334. In that case the court refused to notice that the university courts proceeded according to the rules of the civil law. See also *Lane's case*, 2 Rep. n. (*d*); *Peacock v. Bell*, 1 Saund. 75; and *Dance v. Robson*, M. & M. 295.

(*w*) *Chitty v. Dendy*, 3 A. & E. 324; 4 N. & Man. 842, S. C.

§ 19. In all these and the like cases, where the memory of the judge is at fault, he resorts to such documents or other means of reference as may be at hand, and he may deem worthy of confidence (*x*). Thus, if the point at issue be a date, the judge will refer to an almanac (*y*); if it be the meaning of a word, to a dictionary (*z*); if it be the construction of a statute, to the printed copy; or, in case that appears to be incorrect, to the parliament roll (*a*). In some instances, the judge has refused to take cognizance of a fact, unless the party calling upon him to do so, could produce at the trial some document by which his memory might be refreshed; as was the case in *Van Omeron v. Dowick* (*b*), where Lord Ellenborough declined to take judicial notice of the king's proclamation, the counsel not being prepared with a copy of the *Gazette* in which it was published. So also in *R. v. Withers*, tried before Mr. Justice Buller, in which case it became a material question to consider how far the prisoner owed obedience to his serjeant, and this depended on the articles of war, which were not produced at the trial, the judges thought that they ought to have been produced (*c*). But in many other cases, the courts have themselves made the necessary inquiries, and that too, without strictly confining their researches to the time of the trial. Thus, to give but a few examples: in *Taylor v. Barclay*, where the question was, whether the federal republic of Central America had been recognised by the British government as an independent state, the Vice Chancellor sought for information from the Foreign Office (*d*); in *Chandler v. Grieves*, the Court of Common Pleas directed an inquiry to be made in the Courts of Admiralty as to the maritime law (*e*); in *Doe v. Lloyd* the same court caused an inquiry to be made by their officers, as to the practice of the Inrolment Office in the Court of Chancery (*f*); and in *Willoughby v. Willoughby*, Lord Hardwicke himself asked an eminent conveyancer respecting the existence of a general rule of practice in that branch of the profession (*g*).

(*x*) *Greal. Ev.* 295.

(*y*) *Page v. Faucet*, *Cro. Eliz.* 227.

(*z*) *Clementi v. Golding*, 2 *Camp.* 25.

(*a*) *R. v. Jeffries*, 1 *Str.* 446; *Spring v. Eve*, 2 *Mod.* 240.

(*b*) 2 *Camp.* 44.

(*c*) Cited by Buller, J., in *R. v. Holt*, 5 *T. R.* 446.

(*d*) 2 *Sim.* 221.

(*e*) 2 *H. Bl.* 606, n. *a*.

(*f*) 1 *M. & Gr.* 685. The court in that case acted on the authority of *Worsley v. Filiaker*, 2 *Roll. R.* 119.

(*g*) 1 *T. R.* 772.

CHAPTER III.

OF THE FUNCTIONS OF THE JUDGE AS DISTINGUISHED FROM
THOSE OF THE JURY (a).

§ 20. LORD HARDWICKE has observed, and all reflecting men will agree in the observation, that "It is of the greatest importance to the law of England, and to the subject, that the powers of the judge and jury be kept distinct" (b); yet important as this object undoubtedly is, it is one which, even at the present day, is not very perfectly effected. The general principle, that the judge must determine the law, and the jury the fact, is not, and cannot be, disputed (c); but in the application of this principle at *Nisi Prius*, embarrassing

(a) The substance of this chapter has already appeared in 3rd No. of Law Rev. 27—44.

(b) *R. v. Poole*, Cas. Temp. Hard. 28.

(c) In *R. v. the Dean of St. Asaph*, Lord Mansfield declared, "that the fundamental definition of trial by jury depended upon the universal maxim, *ad questionem juris non respondent juratores; ad questionem facti non respondent iudices*;" and his lordship added—"Where a question can be proved by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court; when, by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law; they are not sworn to decide the law; they are not required to decide the law It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it *in their power* to do wrong, which is a matter entirely between God and their own consciences." 21 How. St. Tr. 1039, 1040. So, in an elaborate essay on this subject, published by Mr. Hargrave, as a note to 1 Co. Lit. 155 b., the learned author states the result to be, "that the *immediate* and *direct* right of deciding upon questions of law is intrusted to the judges; that in a jury it is only *incidental*; that in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and, therefore, that in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of judges." In America, the same principles have been lately expounded, in forcible language, by Mr. Justice Story. "Before I proceed," said he, "to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life. His argument is, that in criminal cases, and especially

questions not infrequently arise, from the experienced difficulty of defining with clearness the obscure and shifting boundaries of law and fact. In the present chapter it is proposed briefly to discuss this subject, and to lay down such general rules as may practically be of use in distinguishing the relative duties of judges and jurors.

§ 21. The duty of a judge presiding at *Nisi Prius* is threefold :— First, he must decide all questions respecting the admissibility of evidence ; secondly, he must instruct the jury in the rules of law, by which the evidence, when admitted, is to be weighed ; and

in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each, they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law ; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error, there would be no remedy or redress by the injured party ; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land ; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought that a jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law, that it is his privilege and truest shield against oppression and wrong ; I feel it my duty to state my views fully and openly on the present occasion." *U. S. v. Battiste*, 2 Sumn. 243. See further on this interesting subject, 2 Wynn's *Eunomus* ; *Bushell's case*, 6 How. St. Tr. 999, 1008, 1013, 1014 ; *Vaughan's R.* 135, S. C. ; *Francklin's case*, 17 How. St. Tr. 625 ; and *R. v. Woodfall*, 5 Burr. 2661.

lastly, he must explain to them those general principles of law, that are applicable to the point at issue (*d*). In discharging the first duty, it frequently happens that the admissibility of a witness or an instrument is found to depend on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the judge, and adjudicated on by him *alone* (*e*). Thus, for example—if the question be whether a confession should be excluded on account of some previous threat or promise, the judge must decide, first, whether the threat or promise was really made; and, secondly, whether, if made, it was sufficient in law to warrant the exclusion of the evidence (*f*). So, if a dying declaration be tendered in evidence, and its admissibility rest upon the fact that the deceased believed, when he made it, that he was at the point of death, the question, whether this fact be satisfactorily proved, must be determined by the judge (*g*). So, the judge alone must decide, whether the declarant in a question of pedigree has been proved to be a deceased member of the family; and it makes no difference in this rule, that the relationship of the declarant happens to be the very question at issue in the cause (*h*). So, if proof be offered of the signature of an attesting witness, and the admissibility of this evidence turns on the fact, whether or not the witness has absented himself from the trial by collusion with the opposite party, the judge must decide on the existence of this fact (*i*). In like manner, if the question be whether a document has been duly executed, or stamped (*j*); or whether it comes

(*d*) Among the questions propounded by the Irish Parliament to the judges of that country in 1641, was one, “whether the judge or jurors ought to be judge of the matter of fact,” to which the judges replied, that “although the jurors be the sole judges of matter of fact, yet the judges of the court are judges of the *validity of the evidence*, and of the *matters of law arising out of the same*, wherein the jury ought to be guided by them.” 2 Nalson’s Coll. of State Pap. 575, 582. Lond. 1683.

(*e*) *Bartlett v. Smith*, 11 M. & W. 486. (*f*) See 1 Stark. R. 523, n. (b).

(*g*) So resolved by all the judges, in two cases cited by Parke, B., in *Bartlett v. Smith*, 11 M. & W. 486; and in one case cited by Lord Ellenborough, in *R. v. Hucks*, 1 Stark. R. 523. These cases virtually overrule *R. v. Woodcock*, 1 Lea. C. C. 504, where the question was left to the jury by Eyre, C. B.

(*h*) *Doe v. Davies*, 16 L. J. (N. S.) Q. B. 218.

(*i*) *Egan v. Larkin*, 1 Arm. Mac. & Og. 403, per Brady, C. B.

(*j*) *Bartlett v. Smith*, 11 M. & W. 483. In that case, a bill, purporting to be a foreign bill, and stamped accordingly, was objected to, on the ground that it was, in fact, an inland bill, and evidence was offered to prove this fact. Held that the

from the right custody (*j*) ; or whether sufficient search has been made for it, so as to admit secondary evidence of its contents (*k*) ; or if a witness be objected to, on the ground of infidelity, or imbecility of mind, or as being himself a party to the cause ;—in all these and the like cases the preliminary question of admissibility must, in the first instance, be exclusively decided by the judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses, in order to arrive at a just conclusion. So, where evidence is offered of acts done in places other than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in these different parts as to render evidence affecting the one admissible with reference to the other, and he will further be called upon to pronounce whether the acts relied on amount to evidence of ownership (*l*). In a recent case (*m*), witnesses were called to prove a general usage in trade ; but as their testimony was subsequently considered by the judge as amounting to no more than evidence of opinion, it was withdrawn by him from the consideration of the jury, and the court supported his ruling. It was then laid down, as a distinct principle, that where the evidence was by law admissible for the determination of the point raised, the judge was bound to lay it before the jury ; but whether the evidence was admissible or not, was a matter for the decision of the judge alone. In all these cases, however, after the evidence has been finally admitted, its credibility and weight are entirely questions for the jury, who are at liberty, as it seems, to consider all the circumstances of the case, including those already proved before the judge, and to give the evidence only such credit as, upon the whole, they may think it deserves (*n*). The judge merely decides whether there is, *prima facie*, any reason for presenting it at all to the jury.

judge ought to have received the evidence at the time the objection was made, and decided himself upon the admissibility of the instrument ; and, as he had submitted it, as part of the defendant's case, to the jury, a new trial was granted.

(*j*) *Bish. of Meath v. Marq. of Winchester*, 3 Bing. N. C. 198.

(*k*) 11 M. & W. 486, per Alderson, B.

(*l*) *Doe v. Kemp*, 7 Bing. 336, per Bosanquet, J.

(*m*) *Lewis v. Marshall*, 7 M. & Gr. 743, 744.

(*n*) *Welstead v. Levy*, 1 M. & Rob. 139, per Parke, J. ; *Ross v. Gould*, 5 Greenl. 204.

§ 22. Secondly, It is the duty of the judge to point out to the jury any rule of law, which either renders evidence unnecessary, or gives peculiar weight to any particular species of evidence, or defines the manner in which a certain fact must be proved. Thus, he should distinctly explain the nature of any presumptions, which may apply to the point at issue, distinguishing such as are conclusive, from those which are liable to be rebutted by counter evidence; and again, dividing this latter class into those presumptions upon which the jury are bound to act, in the absence of conflicting testimony, and those upon which it is expedient, or allowable, to rely. So, if by the common or statute law, any document, when proved, becomes conclusive evidence of the facts stated therein, it is the province of the judge to point out to the jury that the existence of such facts cannot be disputed or denied, and that the only question for their deliberation is, whether or not the document be duly proved. So, if the uncorroborated testimony of a single witness be insufficient by law to establish guilt, as, for instance, in charges of treason or perjury, the judge must acquaint the jury with the nature and extent of this rule; and even where a conviction founded upon such testimony would be strictly legal, as in the case of an accomplice becoming witness for the Crown, the judge would not properly discharge his duty, if he did not warn the jury against the danger of placing implicit reliance upon statements coming from such a suspicious quarter. Many judges indeed, and those of the greatest ability, have not confined their observations within these limits, but have boldly given their opinions respecting the matters of fact; and although this mode of proceeding, when adopted, as it sometimes has been, in a supercilious spirit, may arouse the jealous feelings of a jury, and may excite them, in their anxiety to prove their independence, to pronounce an unjust verdict (o); yet, it may well be doubted, whether, in the great majority of instances, it would not promote the real interests of justice, if the

(o) "Few things incite me more to repel a doctrine than intolerant attempts to force it on my understanding." See Dr. Channing's Works, vol. 3, p. 319. Lord Bacon, in his advice to Mr. Justice Hutton, says, "You should be a light to jurors to open their eyes, but not a guide to lead them by their noses." Bac. Works, vol. 7, p. 271, ed. Montagu.

judge were temperately to state to the jury what opinions he had formed respecting the merits of the case, and the mode by which he had arrived at his conclusions. The jury would still have the undisputed power of deciding the question as they thought fit; but they would have the advantage of being advised by a man no more liable than themselves to prejudice or partiality, whose long experience in courts of justice must, of necessity, have rendered him far more competent than they can be, to unravel the tangled threads of conflicting testimony. The too common mode of summing up—"Gentlemen, if you think so and so, you will find for the plaintiff, if you think otherwise, you will find for the defendant; gentlemen, the question is for you," though sanctioned by the practice of many able, but somewhat lazy judges, and though possibly in accordance with the strict theory of a trial by jury, is but little calculated to promote the attainment of truth; and in complicated cases before a petty jury, is almost tantamount, if not to a direct denial of justice, at least to a decision of the issue by lot.

§ 28. Lastly, The judge must explain to the jury what principles of law are applicable to the point in issue, and in order to enable him to do so correctly, must distinguish questions of law from questions of fact. This, in ordinary cases, is no difficult task. Thus, for instance, on a charge of larceny, the judge lays down, as a general proposition of law, that all persons who take and remove the personal chattels of another without his consent, and with a felonious intent, are guilty of that crime; and then, according to the circumstances of the case, he explains, with more or less particularity, what constitutes a taking, removing, &c. These, obviously, are questions of law, and together form the major premiss of the syllogism. The jury next decide, whether the evidence proves that the goods have been taken and removed in such a manner, and with such an intent, as the judge has previously shown will amount to larceny. These are questions of fact, and together form the minor premiss. Lastly comes the conclusion of guilt or innocence, which may either be drawn by the jury applying to the facts which *they* find, the rules of law as interpreted by the judge; or, in the event of their considering this task too difficult for them, they are at liberty to find the facts specially, but not

the *mere evidence* on which the facts are founded (*p*), leaving the court to apply the law to such facts, and consequently to pronounce the final decision. But simple as this process appears to be, there are a certain class of cases, in which the line between law and fact has been very indistinctly drawn, and consequently the respective duties of the judge and jury are not yet clearly defined. For instance, if the question be whether a certain party had probable cause for doing an act, or whether he has done an act within a reasonable time, or with due diligence, it is difficult to say, whether the definition of what constitutes probable cause, reasonable time, or due diligence, be for the judge or the jury, and specious arguments will not be wanting in favour of the claims of either party. On the one hand, it may be said, that these terms are as capable of judicial interpretation, as the words conversion, or asportation, which must clearly be explained by the judge; while, on the other hand, it may be urged, that they seem rather addressed to the practical experience of practical men, than to the legal knowledge of the mere lawyer; that, being terms of degree, their meaning is subject to indefinite fluctuation, according to the varying circumstances of each particular case, and, consequently, they defy all attempts to compress them within exact *à priori* definitions. In truth, they are neither matters of fact, nor matters of law exclusively, but are rather matters of quality or opinion, which, for want of a more appropriate name, have been generally termed "mixed cases." They form, in logical phrase, the middle term, and are alike common to both the premises, which are respectively intrusted to the judge and jury, and upon which the ultimate decision must proceed (*q*).

§ 24. Having said thus much respecting the general nature of this class of cases, it remains to be seen what decisions have been reported on the subject; and although some of these will be found to rest rather on arbitrary authority, than on any definite principle of law, it is hoped that their collection and partial

(*p*) *Hubbard v. Johnstone*, 3 Taunt. 209, per Wood, B.; *Harwood v. Goodright*, 1 Cowp. 91, 92, per Lord Mansfield; *Mires v. Solebay*, 2 Mod. 244, 245; 1 St. Ev. 511, 512.

(*q*) See on this difficult subject, 12 Law Mag. 53—74; 1 St. Ev. 512—526.

classification may be of some service to the profession, the more especially as precedents have ever been considered in this country as deservedly entitled to respect and deference.

§ 25. First, It is now clearly established, that the question of *probable cause* must be decided exclusively by the judge, and that the jury can only be permitted to find whether the facts alleged in support of probability, and the inferences to be drawn therefrom, really exist (*r*). This rule is equally binding, however numerous and complicated the facts and inferences may be (*s*); for, although in some cases, it would doubtless be attended with great difficulty to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all, or some only, of the facts and inferences from facts, are made out to their satisfaction, yet the task is not impracticable; and it would obviously savour of gross inconsistency to hold that a rule, which is undisputed in a simple case, should not equally apply where the facts were complicated (*t*). For where could the line be drawn, and who should determine what degree of complexity would transfer the burthen of decision from the judge to the jury? The difficulty, too, is more apparent than real, for it rarely happens but that there are some leading facts in each case, which present a broad distinction to the view, without having recourse to the

(*r*) *Michell v. Williams*, 11 M. & W. 205; *Panton v. Williams*, 2 Q. B. 169; 1 G. & D. 504, S.C.; *Sutton v. Johnstone*, 1 T. R. 493, 510, 544, 545, 547, 784; 1 Br. P. C. 76, 2nd ed., S.C., in Dom. Proc.; *Mitchell v. Jenkins*, 5 B. & Ad. 594—596; *Hinton v. Heather*, 14 M. & W. 134, per Alderson, B.

(*s*) In *Panton v. Williams*, 2 Q. B. 192, Tindal, C. J., observes, "Upon this bill of exceptions, we take the broad question between the parties to be this: whether, in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, that if they find the facts proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. And we are all of opinion that it is the duty of the judge so to do."

(*t*) *Panton v. Williams*, 2 Q. B. 194, 195, per Tindal, C. J., pronouncing the judgment of the Ex. Ch.

less important circumstances (*u*) ; and as the judge has a right to act upon all the uncontradicted facts, it is only where some doubt is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that he is called upon to submit any question to the jury (*v*).

§ 26. Although the rule is as we have stated it, where, in an action on the case for malicious prosecution, the question of probable cause arises, it has been held, both in England and Ireland, that in an action of trespass, the *reasonableness of the belief or suspicion* upon which a party acts in causing an arrest or in detaining goods, is a question which the jury may be called upon to decide (*w*). Thus, if a magistrate, on being sued for false imprisonment, were to rely, under not guilty by statute, upon want of notice of action or the like, the questions whether he believed with some colour of reason, and *bond fide*, that he was acting in pursuance of his lawful authority, so as to entitle him to the protection of the statute, would, in strictness, be for the jury to determine under all the circumstances, if the plaintiff desired their opinion to be taken on the evidence ; though if, as is commonly the case, these questions were first submitted to the judge on an application for a nonsuit, and the plaintiff did not then desire them to be left to the jury, he would be bound by the decision of the judge, if the court thought it warranted by the evidence (*x*).

§ 27. The question of *reasonable time* is open to more doubt than that of probable cause. With respect to some subjects indeed, which from their frequent recurrence admit of the adoption of precise rules as to what constitutes reasonable time, the courts, for the sake of commercial convenience, have laid down such rules ;

(*u*) *Panton v. Williams*, 2 Q. B. 194, 195.

(*v*) *Michell v. Williams*, 11 M. & W. 216, 217, per Alderson, B.

(*w*) *Wedge v. Berkeley*, 6 A. & E. 663 ; 1 N. & P. 665, S.C. ; *Annett v. Osborne*, 2 Jebb. & Sy. 376 ; *Hazeldine v. Grove*, 3 Q. B. 997 ; 3 G. & D. 210, S. C. ; *Hughes v. Buckland*, 15 M. & W. 346.

(*x*) *Hazeldine v. Grove*, 3 Q. B. 997, 1007 ; 3 G. & D. 210, S.C.

and in these cases the duty of the jury is clearly confined to the simple task of ascertaining whether the facts proved, fall within the rules or not. Thus, notice of dishonour of a bill of exchange must be given within a reasonable time, and this has been held by the judges to mean, according as the parties live in the same or in different places, either that the letter containing notice should be so posted, that in the due course of delivery it would arrive on the day following that when the writer receives intelligence of dishonour (*y*) ; or that such letter should be posted before the departure of the mail on the day following the receipt of intelligence (*z*) ; or if there be no post on that day (*a*), or if it start at an unseasonable hour in the morning (*b*), then the writer shall have an additional day. If, too, the bill be presented through a banker, one more day is allowed for giving notice of dishonour than if it were presented by the party himself (*c*). Again, the holder of a cheque, or of a bill or note payable on demand, must present the instrument for payment on or before the day following that on which it was received; for the judges have put this construction upon the term "reasonable time" within which the instrument must be presented (*d*). In applying this last rule, it matters not whether the instrument be presented for payment by the party himself or by his banker; and, therefore, when a cheque, given to a gentleman on the 10th of March, was paid into his bankers' on the 11th, and was presented by them on the 12th to the bankers on whom it was drawn, and who had stopped payment early in that morning, the court held that the payee could not recover the amount of the cheque from the drawer, as the presentment for payment had not been made within a reasonable

(*y*) *Stocken v. Collin*, 7 M. & W. 515; *Smith v. Mullett*, 2 Camp. 208, per Lord Ellenborough; *Hilton v. Fairclough*, id. 633, per Lawrence, J.

(*z*) *Williams v. Smith*, 2 B. & Al. 496. See *Shelton v. Braithwaite*, 7 M. & W. 436.

(*a*) *Geill v. Jeremy*, M. & M. 61, per Lord Tenterden.

(*b*) *Hawkes v. Salter*, 4 Bing. 715; 1 M. & P. 750, S.C.; *Bray v. Hadmen*, 5 M. & Sel. 68; *Wright v. Shawcross*, 2 B. & Al. 501, n.

(*c*) *Alexander v. Burchfield*, 7 M. & Gr. 1066, 1067, per Tindal, C. J.; *Haynes v. Birks*, 3 B. & P. 599; *Scott v. Lifford*, 9 East, 347; 2 Camp. 246, S.C.; *Langdale v. Trimmer*, 15 East, 291.

(*d*) *Rickford v. Ridge*, 2 Camp. 539; *Boddington v. Schlencker*, 4 B. & Ad. 752; *Moule v. Brown*, 4 Bing. N. C. 266.

time, and the bankers at the time of their failure had sufficient funds of the drawer's to pay the cheque (e). Had the payee in this case stipulated that his bankers' names should be crossed upon the cheque, or had the drawer discounted his cheque in the country, the result would have been otherwise, for the drawer would then have been considered as agreeing to the arrangement that the usual course of presentment through a banker should be observed, and the steps actually taken were clearly in conformity with such course (f).

§ 28. The judges have also, with respect to the presentment of bills for payment, taken upon themselves to decide, as a question of law, what constitutes *reasonable hours*, and have held, that if an instrument be payable at a banker's, it must be presented within banking hours (g); if elsewhere, at any time when the drawer may be expected to be found at his place of residence or business, though it be as late as eight or nine o'clock in the evening (h). If, indeed, the banker appoints a person to attend at the office after banking hours, for the purpose of returning an answer to a presentment, and such person does return an answer before midnight, no objection can be taken to the unreasonableness of the hour when the presentment was made (i); and the same rule would seem to prevail if the bill be *personally presented* to the acceptor before twelve o'clock at night on the day that it falls due (j). So, a demand or tender of rent *on the land* must, in order to create or avoid a forfeiture, be made before sunset, this being a rule of convenience adopted by the law to prevent the necessity of one party waiting for the other till midnight. But if the tenant actually meet the lessor, either on or off the land, *at any time* of the last day of payment, and tender the rent, it will be sufficient, provided there was time before

(e) *Alexander v. Burchfield*, 7 M. & Gr. 1061.

(f) *Id.* 1066, 1067, per Tindal, C. J.

(g) *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 M. & Sel. 28.

(h) *Wilkins v. Jadis*, 2 B. & Ad. 188; 1 M. & Rob. 41, S.C.; *Jameson v. Swinton*, 2 Taunt. 224; *Barclay v. Bailey*, 2 Camp. 527, per Lord Ellenborough.

(i) *Garnett v. Woodcock*, 6 M. & Sel. 44; 1 Stark. R. 475, S.C.

(j) See 6 M. & Gr. 624—626, per Parke, B.

midnight to receive and count the money tendered (*k*). The law as to the delivery of goods within reasonable hours was much discussed in the case of *Startup v. Macdonald* (*l*). There the defendant had agreed to purchase certain oil of the plaintiffs, to be delivered within the last fourteen days of March, and the action was brought for not accepting it according to the contract. The defence was that the oil was tendered on the 31st of March at nine at night, which was an unreasonable hour. The jury found by a special verdict that the oil was tendered at half-past eight at night on a Saturday; that there was full time for the plaintiffs to have delivered, and the defendant to have examined, weighed, and received the whole before Sunday morning; but that the time of tendering was unreasonably late. Upon this verdict the Court of Common Pleas gave judgment for the defendant; but the judges of the Exchequer Chamber (Lord Denman *dissentiente*) reversed the decision. Mr. Justice Patteson observed, "It may be conceded that the defendant was not bound to be on his premises ready to receive the oil after the usual hours of business; and if he had gone away, and the plaintiffs had afterwards come, and been unable to make a personal tender, they must have suffered for their delay; but as the defendant *did* wait, and as the tender *was* made in time to complete the delivery within the time specified, the unreasonableness and impropriety of the time, whatever those words mean, form no answer to the action for not accepting the oil" (*m*). Mr. Baron Alderson used language to the same effect (*n*), and thus laid down the general rule: "Wherever, in cases not governed by particular customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day to perform their obligation. The only qualification that I am aware of to this rule is, that in acts requiring time in order that they may be completely performed, the party must, at all events, tender to do the act at such a period, before the end of the last day, as,

(*k*) *Startup v. Macdonald*, 6 M. & Gr. 619, 620, per Patteson, J.; 622, per Alderson, B.; 625, 626, per Parke, B.

(*l*) 6 M. & Gr. 593, in Ex. Ch., reversing the judgment of the court below, as reported in 2 M. & Gr. 395; and in 2 Scott, N. R. 485.

(*m*) 6 M. & Gr. 620.

(*n*) *Id.* 621, 622.

if the tender be accepted, will leave him sufficient time to complete his performance before the end of that day. In the case of a mercantile contract, however, the opposite party is not bound to wait for such tender of performance beyond the usual hours of mercantile business, or at any other than the usual place at which the contract ought to be performed. The party, therefore, who does not make his tender at that usual place, or during those usual hours, runs a great risk of not being able to make it at all. In this case, the plaintiffs have had the good fortune to meet with the defendant, and to make a tender to him in sufficient time. And I think, under these circumstances, that the defendant was bound to accept the goods, and is liable in damages for not accepting them" (o).

§ 29. Again, a reasonable notice to quit a tenancy has for centuries received a legal construction, as meaning a six months' notice (p); and when the tenant holds different portions of the premises from different days, it has been further decided, that the notice refers to the day of entry on the substantial subject of the holding (q). So, in the case of domestic servants, a reasonable notice to quit is a calendar month's warning (r). In all these cases the question being decided by a precise rule of law is entirely withdrawn from the consideration of the jury. Formerly the judges endeavoured to limit to a period of three days, the reasonable time for which a suspected party might be committed for re-examination (s); and although it was afterwards held that

(o) 6 M. & Gr. 622, 623. See also the luminous judgment of Parke, B., id. 623—626.

(p) Doe v. Spence, 6 East, 123, per Lord Ellenborough.

(q) Doe v. Snowdon, 2 W. Bl. 1224; Doe v. Spence, 6 East, 120; Doe v. Watkins, 7 East, 551.; Doe v. Rhodes, 11 M. & W. 600. In this last case the question raised, but not decided, was, whether, where a tenant holds a farm from year to year, the land from the 2nd of February, the house from the 1st of May, a notice to quit the whole, given half a year before the 2nd of February, is sufficient to entitle the landlord to recover the whole in ejectment, on a demise dated the 3rd of February. The inclination of Lord Abinger's opinion appears to have been support of the affirmative.

(r) Nowlan v. Ablett, 2 C. M. & R. 54; Fawcett v. Cash, 5 B. & Ad. 904; 3 N. & M. 177, S. C.

(s) Scavage v. Tatham, Cro. Eliz. 829.

no precise rule could be laid down on this subject, inasmuch as the length of time must vary according to the special circumstances of each case, and must depend upon the probability of obtaining further evidence, yet the better opinion seems to be that, as in the case of probable cause, the jury must ascertain the existence of the facts, leaving the court to determine, upon those facts, whether the time was reasonable or not (*t*). On two occasions, indeed, in England (*u*), and on one in Ireland (*v*), the entire question appears to have been submitted to the jury, but the latter of the two English cases rested upon the authority of the former (*w*), and in the former no objection was taken at *Nisi Prius* to the summing up of the judge, but on a subsequent motion in *Banco* its correctness was questioned, and at the second trial the course stated above was distinctly adopted (*x*). So, in an action against a sheriff for an escape, the question whether the officer was guilty of unreasonable delay in taking the party arrested to prison, is one for the determination of the judge (*y*), as also is the question whether an arrest has been countermanded within a reasonable time (*z*), or whether an executor has had reasonable time to remove the goods from the testator's mansion (*a*). It seems, also, that the judges are the proper parties to decide whether fines, customs, or services are reasonable (*b*), as also whether deeds contain reasonable covenants or powers (*c*). On the other hand, it appears to have been held, that the questions, whether a

(*t*) *Davis v. Capper*, 10 B. & C. 28 ; 5 M. & R. 53 ; 4 C. & P. 134, S. C.

(*u*) *Davis v. Capper*, 10 B. & C. 30, per Gaselee, J. ; *Cave v. Mountain*, 1 M. & Gr. 260, per Lord Abinger ; 1 Scott, N. R. 132, S. C.

(*v*) *Gillman v. Connor*, 2 Jebb. & Sy. 210.

(*w*) *Cave v. Mountain*, 1 M. & Gr. 263, per Tindal, C.J., who adds that Lord Abinger, who tried the cause, "was, under all the circumstances, satisfied with the verdict," and consequently the propriety of his leaving the question to the jury, could not practically be questioned in the court above.

(*x*) *Davis v. Capper*, 4 C. & P. 134 *a*, 138 ; 10 B. & C. 33, 35, 36.

(*y*) *Benton v. Sutton*, 1 Bos. & Pul. 28, per Heath, J.

(*z*) *Scheibel v. Fairbairn*, 1 B. & P. 388. Heath, J., there held, that the arrest ought to have been countermanded in the course of the day in which the debt was received. (*a*) Co. Lit. § 69, and p. 56 *b*.

(*b*) *Id.* 56 *b*, 59 *b* ; *Wilson v. Hoare*, 10 A. & E. 236 ; *Bell v. Wardell*, Willes, 202.

(*c*) *Smith v. Doe d. Jersey*, 2 B. & P. 592, per Abbott, C. J.

crop has been left on the ground for a reasonable time (*d*), so as to enable the tithe-owner to compare the tithe set out with the remainder of the produce; whether the vendor of railway shares has offered to transfer them within a reasonable time (*e*); whether goods purchased by sample have been rejected (*f*), or goods taken by distress have been sold (*g*) within a reasonable time; whether a bill payable after sight has been presented (*h*); whether a voyage insured has been commenced or prosecuted (*i*); or whether costs have been taxed, within such time (*j*), are to be decided by the jury. In attempting to reconcile these conflicting decisions, it may perhaps be urged, that these last-named questions turn upon the ordinary course of business or trade, and, consequently, relate to matters with which the jury are peculiarly acquainted; but whether this be a satisfactory solution of the difficulty we do not here attempt to decide.

§ 30. Questions of *reasonable skill or care, due diligence, and gross negligence* must, in the great majority of instances, be determined by the jury, since the judges can rarely have materials which will enable them to decide such questions by rules of law. Thus, if an action be brought against a surgeon for negligence in the treatment of his patient (*k*), or against a gratuitous bailee for gross carelessness in losing the property intrusted to his care (*l*), what law can possibly define whether such and such conduct amounts to sufficient negligence on the part of the defendant to

(*d*) *Facey v. Hurdorn*, 3 B. & C. 213. (*e*) *Stewart v. Cauty*, 8 M. & W. 160.

(*f*) *Parker v. Palmer*, 4 B. & A. 387. (*g*) *Pitt v. Shew*, 4 B. & A. 206.

(*h*) *Muilman v. D'Equino*, 2 H. Bl. 564; *Fry v. Hill*, 7 Taunt. 397.

(*i*) *Mount v. Larkins*, 8 Bing. 108; 1 M. & Sc. 165, S. C.; *Phillips v. Irving*, 7 M. & Gr. 325. In this last case, the question was left by consent for the decision of the court, who held, "that no certain or fixed time could be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port; but that the time allowed must vary with the varying circumstances, which may render it more or less difficult to obtain such cargo." *Id.* 328, 329, per Tindal, C. J.

(*j*) *Burton v. Griffiths*, 11 M. & W. 817. In this case there was an express traverse of reasonable time, and the judges above concurred with the finding of the jury.

(*k*) 2 A. & E., 261, per Taunton, J.

(*l*) *Doorman v. Jenkins*, 2 A. & E. 256; 4 N. & M. 170, S.C.

entitle the plaintiff to a verdict? In these and the like cases, therefore, the question has usually been left entirely to the jury, and even when they have found a verdict in opposition to the opinion of the presiding judge, the court has generally refused to grant a new trial (*m*). In some cases, where the question relates to matters of legal practice, as, for instance, if a sheriff be charged with neglect of duty in not executing a writ, or if an attorney be sued for negligence in conducting an action, the judges would seem to be more competent than a jury to decide whether the facts proved amount to a want of reasonable care; and perhaps, in such cases, the question would be for them (*n*), though on more than one occasion, such questions have been treated as questions of fact, and have been left for the determination of the jury (*o*).

§ 31. The proper tribunal for deciding questions of *bona fides* (*p*), *actual knowledge* (*q*), *express malice* (*r*), or *real intention* (*s*), is the

(*m*) *Id.* 260—266, per Cur., commenting on, and explaining, *Shiells v. Blackburne*, 1 H. Bl. 168; *Moore v. Mourgue*, 2 Cowp. 479.

(*n*) 2 A. & E. 260, 261, per Taunton, J. See *Godefroy v. Dalton*, 6 Bing. 460, where the judges decided that an attorney had not been guilty of such negligence as would render him liable to an action. "The cases," said Tindal, C.J., in pronouncing the judgment of the court, "appear to establish in general, that the attorney is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in a higher branch of the profession of the law." P. 468.

(*o*) *Reece v. Rigby*, 4 B. & A. 202, per Abbott, C. J.; *Shilcock v. Passman*, 7 C. & P. 292, 293, per Alderson, B.

(*p*) *Wedge v. Berkeley*, 6 A. & E. 663; 1 N. & P. 665, S.C.; *Moore v. Mourgue*, 2 Cowp. 480; *Gray v. Dinnen*, 2 Jebb & Sy. 265; *Coxhead v. Richards*, 2 Com. B. 584, per Cresswell, J.; *Hazeldine v. Grove*, 3 Q. B. 1007; *Hughes v. Buckland*, 15 M. & W. 346. See ante, § 26.

(*q*) *Harratt v. Wise*, 9 B. & C. 712.

(*r*) As in actions for malicious prosecution or arrest. *Mitchell v. Jenkins*, 5 B. & Ad. 588; 1 Camp. 207, n. a.

(*s*) *Doe v. Wilson*, 11 East, 56; *Powis v. Smith*, 5 B. & A. 850; *Doe v. Batten*, 1 Cowp. 243; *Zouch v. Willingale*, 1 H. Bl. 312, per Gould and Wilson, Js.

jury; but we shall presently see, in the chapter on Presumptive Evidence, and in other parts of this work, that the law will sometimes presume the existence of fraud, knowledge, malice, and intention, from the proof of other remote acts, and, whenever these presumptions are embodied in rules of law, the Court will either draw the inference without the aid of a jury, or the jury will be bound to follow the directions of the judge. Moreover, for particular purposes, the decision of these questions is sometimes intrusted to the judge by the express language of the Legislature. Thus, sect. 2 of the Act of 3 & 4 Vict., c. 24, enacts, that if the plaintiff in an action of trespass or on the case, shall recover less damage than forty shillings, he shall not be entitled to costs, unless the judge, or presiding officer (which last words include an arbitrator, when the case is referred at *Nisi Prius*) (*t*), shall, immediately after the verdict (*u*), certify on the back of the record, or of the writ of trial or writ of inquiry, that the action was brought to try a *right*, or that the trespass or grievance was *wilful and malicious* (*v*). So, under the stat. 8 & 9 Will. 3, c. 11, § 1, if several persons be sued in trespass, and one or more of them be acquitted by verdict, the judge, by certifying upon the record immediately after the trial, in open court, that there was *reasonable cause* for making the parties acquitted defendants, may deprive them of costs (*w*).

§ 32. When a question arises as to whether a *communication* was *privileged* or not, the respective duties of the judge and jury seem to be as follows: first, the jury must determine as a question of fact, whether the communication was made *bond fide*; and then, if the fact be found in the affirmative, the judge must decide, as a

(*t*) *Spain v. Cadell*, 8 M. & W. 129.

(*u*) See *Thompson v. Gibson*, 8 M. & W. 281; *Shuttleworth v. Cocker*, 1 M. & Gr. 829; 2 Scott, N. R. 47; and 9 Dowl. 76, S.C.; *Page v. Pearce*, 8 M. & W. 677.

(*v*) See *Foster v. Pointer*, 8 M. & W. 395; *Sherwin v. Swindall*, 12 M. & W. 783.

(*w*) See *Spener v. Harrison*, 2 C. & Kir. 432. See also *Townsend v. Symms*, id. 381, as to a certificate, under 43 Eliz. c. 6, § 2, to deprive a plaintiff of costs, where less than 40*s.* are recovered in an action on promises. See also 8 & 9 Vict. c. 93, ss. 81, 83.

question of law, whether the occasion of the publication was such as to rebut the inference of malice (*w*).

§ 33. It seems that questions respecting permissive occupation (*x*); the assent of an executor to a bequest (*y*); the unsoundness of a horse (*z*); the seaworthiness of a ship (*a*); or the materiality of facts not communicated in effecting an insurance (*b*), are for the jury, though the judge ought to take care that they are not misled by anything that comes out in the evidence (*c*). So, it is the undoubted privilege of the jury to determine, whether there has been an acceptance of goods sufficient to satisfy the Statute of Frauds (*d*). So, the jury must decide whether articles supplied to an infant be *necessaries*; but their decision is subject to the control of the Court (*e*) who have laid down, as general rules of law, first, that this question does not, in any degree, depend upon what allowance the infant may have received from his father, and may have misapplied (*f*); secondly, that the articles must be *really useful*, and therefore that merely ornamental jewellery (*g*), or luxurious confectionery (*h*), are not necessities; and thirdly, that,

(*w*) *Coxhead v. Richards*, 2 Com. B. 584, 603, per Cresswell, J.; 600, per Coltman, J.

(*x*) *Lessee of Phayre v. Fahy, Hayes & Jon.* 128; *Jones v. Boland*, 2 Jebb & Sy. 289; but see *Whiteacre v. Symonds*, 10 East, 13.

(*y*) *Mason v. Farnell*, 12 M. & W. 674, even though "the question depends upon the careful and somewhat critical comparison of the terms of a deed, with the other circumstances and facts of the case," per Alderson, B., *id.* 682, pronouncing the judgment of the court.

(*z*) See per Patteson, J., in *Baylis v. Lawrence*, 11 A. & E. 926.

(*a*) *Clifford v. Hunter*, 3 C. & P. 16, per Lord Tenterden; M. & M. 103, S.C.

(*b*) *Rawlins v. Desborough*, 2 M. & Rob. 328, per Lord Denman.

(*c*) Per Lord Abinger in *Mackintosh v. Marshall*, 11 M. & W. 126.

(*d*) *Lillywhite v. Devereux*, 15 M. & W. 291, per Alderson B., recognising *Edan v. Dudfield*, 1 Q. B. 302, 307; 4 P. & D. 656, S.C.

(*e*) *Harrison v. Fane*, 1 M. & Gr. 553, per Tindal, C. J.

(*f*) *Burghart v. Hall*, 4 M. & W. 727; *Peters v. Fleming*, 6 M. & W. 46.

(*g*) *Peters v. Fleming*, 6 M. & W. 47, 48, per Parke & Alderson, Bs. In that case it was held to be properly left to the jury, whether a watch and gold chain were necessities for an undergraduate. The jury found that they were necessities.

(*h*) *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie*, and *Cripps v. Hills*, 1 D. & Mer. 544; 5 Q. B. 606, S.C.

if useful, they must be such as would be necessary and suitable to the degree and station in life of the infant (i). In a late case, where the jury, in opposition to the opinion of the judge, found that the hiring of horses and gigs was necessary for an Oxford undergraduate, he being the younger son of a man of fortune, and keeping a horse of his own, the Court set aside the verdict as perverse, and granted a new trial (j). Perhaps the safest rule that can be laid down on this subject, is, that the judge must determine whether the articles are *capable* of being necessities, regard being had to the position of the defendant; and if he should decide in the affirmative, the jury will then have to say, whether under the circumstances they were necessities or not (k).

§ 34. It has been recently laid down as a general rule of law, that "*the construction of all written documents*," which term it is presumed would necessarily include Acts of Parliament, judicial records, deeds, wills, agreements or letters, belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the Court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot in any way be

(i) *Peters v. Fleming*, 6 M. & W. 42.

(j) *Harrison v. Fane*, 1 M. & Gr. 550.

(k) *Wharton v. Mackenzie*, and *Cripps v. Hills*, 5 Q. B. 606; 1 D. & Mer. 544, S. C.; in which cases, juries having decided that wine parties and suppers were necessities for Oxford undergraduates, the Court of Queen's Bench granted new trials. In *Chapple v. Cooper*, 13 M. & W. 252, the Court held that the funeral of a husband, who had left no property to be administered, might be regarded as "necessaries," supplied to his infant widow.

effectually set right (*l*). Thus the Court will construe the specification of a patent, though the interpretation of such an instrument, relating as it does to matters of science and skill, would seem peculiarly adapted to the practical information of jurors (*m*); and where a contract for the sale of barley was attempted to be proved by letters, one of which offered *good* barley, and the other accepted the offer, "expecting you will give us *fine* barley and good weight," the Court held, that though the jury might be asked as to the mercantile meaning of the words "good" and "fine," yet, after having found that there was a distinction between them, they could not further decide that the parties did not misunderstand each other, but were bound to take the interpretation of the contract, as a matter of law from the judge (*n*). So, it seems clear, notwithstanding one or two authorities to the contrary (*o*), that the Court must determine, whether a written acknowledgment of a debt (*p*), or of title (*q*), is sufficient to take the case out of the statutes of limitation; though, perhaps, in a doubtful case, it may be a prudent course for the judge to express his own opinion, and also to take the opinion of the jury (*r*); and if the document is connected with other evidence affecting its construction, then the whole must be submitted to the jury

(*l*) Per Parke, B., pronouncing the judgment of the Court, in *Neilson v. Harford*, 8 M. & W. 823.

(*m*) *Neilson v. Harford*, 8 M. & W. 806, 818, 819; 2 Webst. Pat. R. 295, 328, S. C. This case virtually overrules *Hill v. Thompson*, 3 Mer. 630, where Lord Eldon observed, that the *intelligibility of the description* of a specification was a matter of fact.

(*n*) *Hutchison v. Bowker*, 5 M. & W. 535. Parke, B., there observed, "The law I take to be this,—that it is the duty of the Court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the *jury* to say what the *meaning of those expressions* was, but for the *Court* to decide what the *meaning of the contract* was." P. 542. See also *Bourne v. Gatcliffe*, 3 M. & Gr. 643, 689, 690; 3 Scott, N. R. 1, S. C.

(*o*) *Lloyd v. Maund*, 2 T. R. 760; *Linsell v. Bonsor*, 2 Bing. N. C. 241.

(*p*) *Morrell v. Frith*, 3 M. & W. 402; *Routledge v. Ramsay*, 8 A. & E. 222, per Lord Denman.

(*q*) *Doe v. Edmonds*, 6 M. & W. 302, per Parke, B.

(*r*) *Bucket v. Church*, 9 C. & P. 211, per Parke, B.; *Morrell v. Frith*, 3 M. & W. 406, per *id.*

together (*s*). With respect to the construction of letters, the old rule of law appears to have been, that, if extrinsic circumstances were not necessary to explain them, then, like other documents, their interpretation was a pure matter of law; but if they were written in so dubious a manner as to be capable of different constructions, and could be explained by other transactions, the jury, who were clearly the judges of the truth or falsehood of such collateral facts, which might vary the sense of the letters themselves, were to decide upon the whole evidence (*t*). We mention this rule, because, in Ireland, it seems still to prevail; and accordingly, where a question arose whether the defendant had adopted the acceptance of a bill, it was there lately held, that the construction of a letter written by him on the subject, taken in connexion with his subsequent conduct, was entirely for the jury (*u*).

§ 35. The power of the jury to interpret expressions is not confined to such as are employed in contracts, or have a peculiar commercial meaning; but seems to extend to all phrases, capable of being used in a technical sense, which do not require any knowledge of the law to explain them. Thus, the Courts have more than once refused to entertain the question, whether an excavation is a mine, and as such not rateable to the relief of the poor; but having so far laid down a legal principle with reference to the subject, as to decide that the method of working was to be considered, and not the chemical or geological character of the produce, they have declined to go further, and have left the sessions to apply to the question, as one of fact, the information they possess, and their knowledge of the English language (*v*). So, it has been held, that the jury must determine what consti-

(*s*) *Routledge v. Ramsay*, 8 A. & E. 222, per Lord Denman; *Morrell v. Frith*, 3 M. & W. 402.

(*t*) Per Buller, J., in *Macbeath v. Haldimand*, 1 T.R. 182.

(*u*) *Wilkinson v. Storey*, 1 Jebb. & Sy. 509.

(*v*) *R. v. Sedgely*, 2 B. & Ad. 65; *R. v. Brettell*, 3 B. & Ad. 424; *R. v. Dunsford*, 2 A. & E. 568; 4 N. & M. 349, S. C. "The Court of Quarter Sessions are judges of law and fact. The appeal to the Queen's Bench is confined to questions of law. Thus, the distinction between the respective provinces of the two courts is so far analogous to the distinction we are discussing, as to enable us to draw our illustrations from cases of appeal." 12 Law Mag. 64, n. 2.

tutes such a representation of part of a dramatic production, as to subject the person representing it to penalties under the Act of 3 & 4 Will. 4, c. 15 (*w*). But the jury will not be allowed to examine a record, for the purpose of giving their opinion as to what word has been written above an erasure, for the inspection of a record is within the peculiar province of the Court (*x*).

§ 36. On the rule of law, which intrusts the judge with the interpretation of written instruments, an exception has been engrafted in certain cases, when the writing forms the subject of an indictment or an action on the case, and the guilt or innocence of the defendant depends upon the popular meaning of the language employed. Thus, on a prosecution for writing a threatening letter (*y*), the jury will, upon examination of the paper, decide whether it contains a menace (*z*). So, with respect to indictments for *libel*, the legislature, after much acrimonious discussion between the judges on the one hand, and the advocates of popular rights on the other (*a*), has expressly determined (*b*), that the question

(*w*) *Planchè v. Braham*, 4 Bing. N. C. 19.

(*x*) *R. v. Hucks*, 1 Stark. R. 522, per Lord Ellenborough.

(*y*) See 7 & 8 Geo. 4, c. 27, and 7 & 8 Geo. 4, c. 29, § 8.

(*z*) *R. v. Girdwood*, 1 Lea. C. C. 142; 2 East, P. C. 1120, S. C.

(*a*) As to this celebrated dispute, see, in support of the claims of the judges, *R. v. Udall*, 1 How. St. Tr. 1289; *R. v. Woodfall*, 20 id. 913, 918, 920, per Lord Mansfield; 5 Burr. 2661, S. C.; *R. v. Dean of St. Asaph*, 21 How. St. Tr. 1033, per Lord Mansfield; and in support of the rights of the jury, *R. v. Tutchin*, 14 id. 1128, per Lord Holt; *R. v. Owen*, 18 id. 1223, 1227; *R. v. Dean of St. Asaph*, 21 id. 922, 971, arguments of Mr. Erskine, and 1040, per Willes J.; 29 id. 49, per Lord Ellenborough; 1 Woodfall's Junius, 14, *et seq.*, 163, 169—176. As to proceedings in the House of Lords on passing the Libel Act, see 22 How. St. Tr. 294, 297.

(*b*) 32 Geo. 3, c. 60, § 1, enacts that, on every trial of an indictment or information for a libel, "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge, before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." § 2 provides, "That, on every such trial, the court or judge, before whom such indictment or information shall be tried, *shall*,* according to their or his discretion, give their or his opinion and

* Semble the word "shall" should here be interpreted as if the word "may" had been used. See per Littledale, J., in *Baylis v. Lawrence*, 11 A. & E. 925.

whether the particular publication, which is the subject of inquiry, is of a libellous character, and is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is one upon which the jury must exercise their judgment, and pronounce their opinion, as a question of fact. The judge, indeed, as a matter of advice to them in deciding that question, may give his own opinion respecting the nature of the publication, but is not bound to do so as a matter of law (c). The statute here noticed is strictly applicable to criminal trials only, but, being a declaratory Act, its provisions have been adopted in civil actions for libel, and, for a series of years, it has been the course for the judge, first to give a legal definition of the offence, and then to leave the jury to determine whether the writing complained of falls within that definition or not (d). It is not, however, absolutely necessary that the judge should explain what constitutes a libel, but he may leave the whole question without reserve to the jury (e); though, if they find a verdict against the defendant, either on an indictment or an action, the Court will arrest the judgment, if the writing, on the face of it, is not libellous (f).

§ 37. In regard to *foreign laws*, usages and customs, which we have already seen (g) cannot be judicially noticed, but must be proved as facts, the distinction between the functions of the judge and the jury, does not yet appear to be very clearly defined. It would seem, however, that while the *existence and abstract meaning* of the law must, in general, be determined by the jury on the testimony of the skilled witnesses (h), it will be the duty of the Court to decide, first, as to the competent knowledge of

directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases." § 3 provides, that a jury may find a special verdict; and § 4, reserves to defendants a right to move in arrest of judgment.

(c) Per Parke, B., in *Parmiter v. Coupland*, 6 M. & W. 108.

(d) *Id.* 107, 108.

(e) *Baylis v. Lawrence*, 11 A. & E. 920.

(f) *Hearne v. Stowell*, 12 A. & E. 719; 4 P. & D. 696, S. C.; *Goldstein v. Foss*, 6 B. & C. 154; *Parmiter v. Coupland*, 6 M. & W. 106, per Alderson, B.

(g) *Ante*, § 5.

(h) *R. v. Picton*, 30 How. St. Tr. 536—540, 864—870.

the witnesses called (*i*); next, as to the admissibility of the documents by which they seek to refresh their memory (*j*); and lastly, as to the special applicability of the law, when proved, to the particular matter in controversy (*k*). If, indeed, the admissibility or inadmissibility of certain evidence depends on the existence or interpretation of a foreign law, the proof should exclusively be addressed to the Court, as in other cases where questions respecting the admissibility of evidence rest upon disputed facts (*l*). Perhaps, also, as all matters of law are properly referable to the Court, and as the object of the proof of foreign law is to enable the Court to instruct the jury as to its bearing on the case in hand, it will always be advisable for the judge to assist the jury in ascertaining what the law really is (*m*).

§ 38. Before leaving the subject of foreign law, it will be important to notice, that the peculiar rules of evidence adopted in one country, whether established by the practice of its courts, or enacted by the legislature for the government of those courts, cannot be extended to regulate the proceedings of courts in another country, when transactions, which took place in the former country, become the subject of investigation in the latter (*n*). For instance, if the assignees of a bankrupt under an English fiat were to bring an action in Calcutta against a debtor of the bankrupt, and the pleas were to put in issue the bankruptcy and the assignment, the affirmative of these issues could not be proved by producing copies of the proceedings in the Bankruptcy Court, purporting to bear the seal of that court, and to be signed by the Clerk of Enrolments; for, although, by the statutes relating to bankruptcy, such evidence would be sufficient in English courts of justice, it would not even be admissible in India, as the Acts do not extend to

(*i*) This subject is discussed post. See Index, Tit. *Foreign Law*.

(*j*) *Id.*; *Church v. Hubbard*, 2 Cranch, 187, 236—238.

(*k*) Story, *Conf. of Laws*, § 638.

(*l*) *Traaher v. Everhart*, 3 Gill. & John. 234, 242; Story, *Conf. of Laws*, § 638, note 3; ante, § 21.

(*m*) Story, *Conf. of Laws*, § 638 & n. 3; *Mostyn v. Fabrigas*, 1 Cowp. R. 174, per Lord Mansfield.

(*n*) *Clark v. Mullick*, 3 Moo. P. C. R. 279, per Lord Brougham.

that country (o). Again, although, by the Scotch law, all instruments prepared and witnessed according to the provisions of the Act of 1681, are probative writs, and may be given in evidence without any proof, yet still, if it were required to prove one of these Scotch instruments in an English court, its mere production would not suffice, but it would be necessary to call one or other of the attesting witnesses (p). The case of *Brown v. Thornton* (q) is another illustration of this rule. There, a charter-party had been entered into at Batavia; and, in accordance with the Dutch law which prevails in that colony, the contract had been written in the book of a notary, and a copy sealed by the notary and countersigned by the governor of Java had been delivered to each of the parties. In the courts of Java, the contract is proved by producing the notary's book; but in all other Dutch courts the copies are received as due evidence of the original. Under these circumstances, the plaintiff in an English court tendered his copy of the charter-party as evidence of the contract, but the Court held that it was inadmissible, on the ground that English judges could not adopt a rule of evidence from foreign courts. Several other cases could be cited to the same effect (r); and in all, the distinction is recognised between *the cause of action*, which must be judged of according to the law of the country where it originated, and the *mode of proceeding*, including, of course, the rules of evidence, which must be adopted as it happens to exist in the country where the action is brought (s).

(o) *Clark v. Mullick*, 3 Moo. P. C. R. 252, 280.

(p) *Yates v. Thomson*, 3 Cl. & Fin. 577, 580, *et seq.*, per Lord Brougham.

(q) 6 A. & E. 185.

(r) *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Huber v. Steiner*, 2 Bing. N. C. 202; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Appleton v. Lord Braybrook*, 2 Stark. R. 6; 6 M. & Sel. 34, S.C.; *Black v. Lord Braybrook*, 2 Stark. R. 7; 6 M. & Sel. 39, S.C.; *Don v. Lippmann*, 5 Cl. & Fin. 1, 13—17.

(s) 1 Smith, Lead. Ca. 167. See also Story, Conf. of Laws, § 629—636.

CHAPTER IV.

OF THE GROUNDS OF BELIEF.

§ 39. WE proceed now to a brief consideration of the *General Nature and Principles of Evidence*. No inquiry is here proposed into the origin of human knowledge; it being assumed, on the authority of approved writers, that all that men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge, acquired by an individual through his own perception and reflection, is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge, having been acquired through the perceptions of others (*a*). It is not easy to conceive, that the Supreme Being, whose wisdom is so conspicuous in all his works, constituted man to believe only upon his own personal experience; since, in that case, the world could neither be governed nor improved; and society must remain in the state in which it was left by the first generation of men. On the contrary, during the period of childhood, we believe implicitly almost all that is told us; and thus are furnished with information, which we could not otherwise obtain, but which is necessary, at the time, for our present protection, or as the means of future improvement. This disposition to confide in the veracity of others, and to believe what they say, may be termed *instinctive*. At an early period, however, we begin to find that, of the things told to us some are not true; and thus our implicit reliance on the testimony of others is weakened; first, in regard to particular things, in which we have been deceived; then in regard to persons, whose falsehood we have detected; and, as these instances multiply upon us, we gradually become more and more distrustful of statements made to us, and learn by experience, the necessity of testing them by certain rules (*b*). "Confidence," exclaimed Lord Chatham, on a memorable occasion, "is a plant of slow growth,

(*a*) Abercrombie on Intell. Pow., Part 2, p. 42.

(*b*) Ibid., Part 2, § 3, p. 73.

in an aged bosom;" and, indeed, it may be generally observed, that, as our ability to obtain knowledge by other means increases, our instinctive and indiscriminate reliance on testimony diminishes, by yielding to a more rational belief (c). Still, in every

(c) Gambier's Guide, 87 ; M'Kinnon's Philos. of Evi., 40. This subject is treated more largely by Dr. Reid in his profound Inquiry into the Human Mind, c. 6, § 24, p. 196, 197 of his collected Works, in these words :—"The wise and beneficent Author of Nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath, for these purposes, implanted in our nature two principles, that tally with each other. The first of these principles is a propensity to speak truth, and to use the signs of language, so as to convey our real sentiments. This principle has a powerful operation, even in the greatest liars ; for where they lie once they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only that we yield to a natural impulse. Lying, on the contrary, is doing violence to our nature ; and is never practised, even by the worst men, without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end ; but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end, which he cannot otherwise attain. If it should be objected, that men may be influenced by moral or political considerations to speak truth, and therefore, that their doing so is no proof of such an original principle as we have mentioned ; I answer, first, that moral or political considerations can have no influence, until we arrive at years of understanding and reflection ; and it is certain from experience, that children keep to truth invariably, before they are capable of being influenced by such considerations. Secondly, when we are influenced by moral or political considerations, we must be conscious of that influence, and capable of perceiving it upon reflection. Now, when I reflect upon my actions most attentively, I am not conscious, that in speaking truth I am influenced on ordinary occasions by any motive, moral or political. I find, that truth is always at the door of my lips, and goes forth spontaneously, if not held back. It requires neither good nor bad intention to bring it forth, but only, that I be artless and undesigning. There may indeed be temptations to falsehood, which would be too strong for the natural principle of veracity, unaided by principles of honour or virtue ; but where there is no such temptation, we speak truth by instinct ; and this instinct is the principle I have been explaining. By this instinct, a real connection is formed between our words and our thoughts, and thereby the former become fit to be signs of the latter, which they could not otherwise be. And although this connection is broken in every instance of lying and equivocation, yet these instances being comparatively few, the authority of human testimony is only weakened by them, but not destroyed. Another original principle, implanted in us by the Supreme Being, is a disposition to confide in the veracity of others, and to believe what they tell us. This is the counterpart to the former ; and as that may be called the principle of veracity, we shall, for want of a proper name, call this the principle of credulity. It is unlimited in children, until

period of life, and in every state of intellectual culture, man is instinctively more prone to believe, than to disbelieve, the testimony of others; and this disposition towards credulity may be

they meet with instances of deceit and falsehood; and it retains a very considerable degree of strength through life. If nature had left the mind of the speaker in equilibrio, without any inclination to the side of truth more than to that of falsehood, children would lie as often as they speak truth, until reason was so far ripened, as to suggest the imprudence of lying, or conscience, as to suggest its immorality. And if nature had left the mind of the hearer in equilibrio, without any inclination to the side of belief more than to that of disbelief, we should take no man's word, until we had positive evidence that he spoke truth. His testimony would, in this case, have no more authority than his dreams, which may be true or false; but no man is disposed to believe them, on this account, that they were dreamed. It is evident, that, in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself, when there is nothing put into the opposite scale. If it was not so, no proposition, that is uttered in discourse, would be believed, until it was examined and tried by reason; and most men would be unable to find reasons for believing the thousandth part of what is told them. Such distrust and incredulity would deprive us of the greatest benefits of society, and place us in a worse condition than that of savages. Children, on this supposition, would be absolutely incredulous, and therefore absolutely incapable of instruction; those who had little knowledge of human life, and of the manners and characters of men, would be in the next degree incredulous; and the most credulous men would be those of greatest experience, and of the deepest penetration; because, in many cases, they would be able to find good reasons for believing testimony, which the weak and the ignorant could not discover. In a word, if credulity were the effect of reasoning and experience, it must grow up and gather strength, in the same proportion as reason and experience do. But if it is the gift of nature, it will be strongest in childhood, and limited and restrained by experience; and the most superficial view of human life shows, that the last is really the case, and not the first. It is the intention of nature, that we should be carried in arms before we are able to walk upon our legs; and it is likewise the intention of nature, that our belief should be guided by the authority and reason of others, before it can be guided by our own reason. The weakness of the infant, and the natural affection of the mother, plainly indicate the former; and the natural credulity of youth and authority of age as plainly indicate the latter. The infant, by proper nursing and care, acquires strength to walk without support. Reason hath likewise her infancy, when she must be carried in arms; then she leans entirely upon authority, by natural instinct, as if she was conscious of her own weakness; and without this support, she becomes vertiginous. When brought to maturity by proper culture, she begins to feel her own strength, and leans less upon the reason of others; she learns to suspect testimony in some cases, and to disbelieve it in others; and sets bounds to that authority, to which she was at first entirely subject. But still, to the end of life, she finds a necessity of borrowing light from testimony, where she has none within herself, and of leaning, in some degree, upon the reason of others, where she is conscious of her own imbecility.

regarded as a fundamental principle of our moral nature, implanted in us by the Almighty for the wisest and most beneficent purposes. As such it constitutes the general basis upon which all evidence may be said to rest.

§ 40. Subordinate to this paramount and original principle, it may, in the *second* place, be observed, that evidence rests upon our *faith in human testimony, as sanctioned by experience*; that is, upon the generally experienced truth of the statements on oath of men of integrity, having capacity and opportunity for observation, and without apparent influence, from passion or interest, to pervert the truth. This belief is strengthened by our knowledge of the narrator's reputation for veracity and intelligence, by the absence of conflicting testimony, and by the presence of that which is corroborating and cumulative (*d*).

§ 41. It is obvious, that, in the hasty progress of a trial at Nisi Prius, it is frequently difficult, and sometimes impossible, to ascertain with anything like certainty, what characters the witnesses respectively deserve for honesty and intelligence, and how far they are actuated by interested, malignant, or other improper motives. On these heads considerable doubt must almost always exist; although a rigid cross-examination, when skilfully applied, will certainly throw much light upon the subject; and a careful attention to the demeanour of the witness will furnish

And, as in many instances, Reason, even in her maturity, borrows aid from testimony; so in others she mutually gives aid to it and strengthens its authority. For, as we find good reason to reject testimony in some cases, so in others we find good reason to rely upon it with perfect security, in our most important concerns. The character, the number, and the disinterestedness of witnesses, the impossibility of collusion, and the incredibility of their concurring in their testimony without collusion, may give an irresistible strength to testimony, compared to which its native and intrinsic authority is very inconsiderable."

(*d*) Archbishop Whately, in his admirable *jeu d'esprit*, entitled, "Historic Doubts relative to Napoleon Buonaparte," has clearly stated the main tests of human veracity. "I suppose," says he, "it will not be denied that the three following are among the most important points to be ascertained, in deciding on the credibility of witnesses; first, whether they have the means of gaining correct information; secondly, whether they have any interest in concealing truth, or propagating falsehood; and, thirdly, whether they agree in their testimony."—P. 14, 6th ed.

a no less valuable guide. Thus, while simplicity, minuteness, and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually laboured, cautious, and indistinct (*e*). So, when we find a witness over zealous on behalf of his party; exaggerating circumstances; answering without waiting to hear the question; forgetting facts wherein he would be open to contradiction; minutely remembering others, which he knows cannot be disputed; reluctant in giving adverse testimony; replying evasively; pretending not to hear the question, for the purpose of gaining time to consider the effect of his answer; affecting indifference; or, often vowing to God, and protesting his honesty; we have indications, more or less conclusive, of insincerity and falsehood (*f*). On the other hand, in the testimony of witnesses of truth there is a calmness and simplicity; a naturalness of manner; an unaffected readiness and copiousness of detail, as well in one part of the narrative as another; and an evident disregard of either the facility or difficulty of vindication or detection (*g*).

§ 42. Besides these tests of truth, which are obviously of value in fixing what amount of credit is due to each *individual* witness, there are certain general rules which may be borne in mind, as tending to shadow forth, rather than define, the relative merits of particular *classes of witnesses*. Thus, it has been justly observed, that "a propensity to lying has been always, more or less, a peculiar feature in the character of an enslaved people—accustomed to oppression of every kind, and to be called upon to render strict account for every trifle done, not according to the rules of justice, but as the caprice of their masters may suggest;—it is little to be wondered at, if a lie is often resorted to as a supposed refuge from punishment, and that thus an habitual disregard is engendered" (*h*). We cite this passage, as accounting in some measure for the lamentable neglect of truth, which is evinced by most of the nations of India, and by many of the peasantry in Ireland (*i*).

(*e*) Channing, *Ev. of Christ.*, 3rd vol. of Works, 356.

(*f*) 1 St. Ev., 547.

(*g*) Greenl. on Test. of Evangelists, § 40.

(*h*) Bp. of Tasmania's Lect. on Christ. Catechism, 519.

(*i*) The Antiquarian loves to trace the Irish blood from a Carthaginian stock.

§ 43. Again, as the chief motive for exaggeration springs from an innate vain love of the marvellous (*j*), and as this love, like all other, is most remarkable in the softer sex (*k*), a prudent man will, in general, do well to weigh with some caution the testimony of *female witnesses*. This care is all the more necessary, when we reflect what an extensive and dangerous field of falsehood is opened up by mere exaggeration; for as truth is made the groundwork of the picture, and fiction lends but light and shade, it often requires more patience and acuteness than most men possess, or are willing to exercise, to distinguish fact from fancy, and to repaint the narrative in its proper colours (*l*). In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent (*m*). Having pointed out this proneness to exaggerate as a feminine weakness, it is only just to add, that, in other respects, the testimony of women is at least deserving of equal credit to that of men. In fact, they are in some respects far superior witnesses; for first, they are, in general, closer observers of events than men; next, their memories, being less loaded with matters of business, are usually more tenacious; and lastly, they often possess unrivalled powers of simple and unaffected narration (*n*).

§ 44. Sir William Blackstone appears to have thought (*o*), that less credit was due to the testimony of a *child* than to that of an adult; but reason and experience scarcely warrant this opinion. In childhood, the faculties of observation and memory are usually more active than in after life, while the motives of falsehood are then less numerous and less powerful. The inexperience and artlessness which, in a great measure, must accompany tender years, render a child incapable of sustaining consistent perjury, while

(*j*) Bp. of Tasmania's Lect. on Christ. Catechism, 522.

(*k*) The woman of Samaria affords a striking example of this proneness to exaggerate. When our Saviour told her she had had five husbands, she went into the city, saying, "Come, see a man which told me *all things which ever I did*."—4th ch. of St. John.

(*l*) Bp. of Tasmania's Lect. on Christ. Catechism, 522.

(*m*) Id.

(*n*) Take, for instance, the Letters of Madame de Sévigné, or Lady Mary Wortley Montagu, which can only be rivalled, if at all, by those of that semi-woman, Lord Orford.

(*o*) 4 Bl. Com. 214.

the same causes operate powerfully in preventing his true testimony from being shaken by the adroitness of counsel. Not comprehending the drift of the questions put to him in cross-examination, his only course is to answer them according to the fact. Thus, if he speak falsely, he is almost inevitably detected; but if he be the witness of truth, he avoids that imputation of dishonesty, which sometimes attaches to older witnesses, who, though substantially telling the truth, are apt to throw discredit on their testimony, by a too anxious desire to reconcile every apparent inconsistency.

§ 45. With respect to *policemen, constables*, and others employed in the suppression and detection of crime, their testimony against a prisoner should usually be watched with care; not because they intentionally pervert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious, and by the frequent contemplation of human nature in its most revolting form, almost necessarily leads them to ascribe actions to the worst motives, and to give a colouring of guilt to facts and conversations, which are, perhaps, in themselves consistent with perfect rectitude (*p*). "That all men are guilty, till they are proved to be innocent," is naturally the creed of the police; but it is a creed which finds no sanction in a court of justice. As a set-off to this tendency on the part of the police to regard conduct in the worst point of view, it must in fairness be stated, that, in every other respect, the general mode in which they give their testimony is unimpeachable; and that, except when blinded by prejudice, they may well challenge a comparison with any other body of men in their rank of life, as upright, intelligent, and trustworthy witnesses.

§ 46. Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions*; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgments

(*p*) See post, § 55.

become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion. To adopt the language of Lord Campbell, "they come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence" (g).

§ 47. A *third* ground of the credibility of evidence is afforded by the exercise of our reason upon the effect of *coincidences in the testimony of independent witnesses*. These coincidences, when sufficiently numerous, and presented to us in the shape of undesigned correspondency, or incidental allusion, necessarily produce a prodigious effect in enforcing belief; because, if collusion be excluded, and no deception has been practised on the witnesses, the harmony in their evidence cannot be explained upon any other hypothesis than that the statements severally made are true. Each witness taken singly may be notorious for lying; but the chances against their all agreeing by accident in the same lie may be so great, as to render the agreement morally impossible (r). On this subject, it has been profoundly remarked, that "in a number of concurrent testimonies, where there has been no previous concert, there is a probability distinct from that which may be termed the sum of the probabilities resulting from the testimonies of the witnesses; a probability which would remain, even though the witnesses were of such a character as to merit no faith at all. This probability arises purely from the concurrence itself. That such a concurrence should spring from chance, is as one to infinite; that is, in other words, morally impossible. If, therefore, concert be excluded, there remains no cause but the reality of the fact" (s). So also, Lord Mansfield justly observed on one occasion, "It is objected that the books [Keble's and Freeman's Reports] are of no authority; but if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstration of the truth of what they report, or they could not agree" (t). The

(g) Tracy Peer. 10 Cl. & Fin. 191. See post, § 55.

(r) Abercrombie on Intell. Pow., Part 2, § 3, p. 91.

(s) Campbell's Philos. of Rhetoric, ch. v., b. 1, Part 3, p. 125; Whately's Rhetoric, Part 1. ch. 2, § 4, pp. 58, 59.

(t) R. v. Genge, 1 Cowp. 16.

word "substantially" here used is highly important, with a view to the question of collusion, since it is scarcely possible that several independent witnesses should tell precisely the same tale, without any variation. Dr. Paley, who has treated this subject with great ability in his *Evidences of Christianity*, states, that "the usual character of human testimony is *substantial truth under circumstantial variety*. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud" (u). These last observations apply with almost overwhelming force, when the facts deposed to consist of conversations, or of a series of trifling and unimportant events, and the testimony is given after the lapse of a considerable interval of time (v).

§ 48. *Fourthly*—In receiving the knowledge of facts from the testimony of others, we are much influenced by their *accordance with facts previously known or believed*; and this constitutes what is termed their *probability*. Statements, thus probable, are received upon evidence much less cogent than we require for the belief of those which do not accord with our previous knowledge; but while such statements are more readily received, and justly relied upon, we should beware of unduly distrusting all others. While unbounded credulity is the attribute of weak minds, which seldom think or reason at all—quo magis nesciunt, eò magis admirantur—indiscriminate scepticism belongs only to those who, affecting to make their own knowledge and observation the exclusive standard of probability, forget that they are liable to be misled even by their own senses (w). Such persons, therefore, if they intend to sustain a truly consistent character, should act like Molière's Docteur, in

(u) Part 3, ch. 1, p. 158.

(v) See further on this interesting subject, Greenl. on Test. of Evangelists, §§ 34—36.

(w) Abercrombie on Intell. Pow., Part 2, § 3, p. 74. Channing on Ev. of Revealed Relig., 3d vol. of Works, p. 116, observes—"All my senses have sometimes given false reports."

"Le Mariage Forcé," who in answer to Sganarelle's statement that he had come to see him, replied, "Seigneur Sganarelle, changez, s'il vous plait, cette façon de parler. Notre philosophe ordonne de ne point énoncer de proposition décisive, de parler de tout avec incertitude, de suspendre toujours son jugement; et par cette raison, vous ne pouvez pas dire, je suis venu, mais, *il me semble* que je suis venu" (*x*). Sceptical philosophers, however, inconsistently enough with their own principles, yet true to the nature of man, continue to receive a large portion of their knowledge upon testimony derived, not from their own experience, but from that of other men; and this, even when it is at variance with much of their own personal observation. Thus they receive, with confidence, the testimony of the historian in regard to the occurrences of ancient times; that of the naturalist and the traveller, in regard to the natural history and civil condition of other countries; and that of the astronomer, respecting the heavenly bodies; facts which, upon the narrow basis of their own "firm and unalterable experience," upon which Mr. Hume so much relies, they would be bound to reject, as wholly unworthy of belief (*y*).

§ 49. Still, it is not the miscalled philosopher alone, who is too ready to lend an academic faith to a narrative of facts which do not strictly accord with preconceived opinions, mistaken for knowledge. In all ranks and conditions of life, persons of this stamp abound, and the errors, to which their habits of distrust expose them, are at times sufficiently ridiculous. Thus, the king of Siam rejected the testimony of the Dutch ambassador, that, in his country, water was sometimes congealed into a solid mass; for it was utterly repugnant to his own experience (*z*). In like manner, the marvellous but true stories narrated by the Abyssinian traveller Bruce, were long considered by his countrymen as mere fictions; and within the last few years, the evidence given by Mr., now Sir Isambart Brunel, before a parliamentary committee, was much impaired by his having ventured an opinion, that steam-carriages might possibly travel on railroads ten miles an hour (*a*). A contemplation of the instances here given, and of others which will

(*x*) Scène 8.

(*y*) Abercrombie on Intell. Pow., Part 2, § 3, pp. 79, 80.

(*z*) Id. p. 75.

(*a*) Gresley, Ev. 360, n.

readily occur to the reader, naturally suggest two reflections ; first, that, with our finite knowledge, we should be slow to reject a narrative as incredible, merely because it is beyond, or even contrary to, our own very limited experience ; and next, that progress in knowledge is not confined, in its results, to the simple facts ascertained, but has also an extensive influence in enlarging the understanding for the further reception of truth, and in setting it free from many of the prejudices which influence men, whose minds are limited by a narrow field of observation. Thus, Archimedes, deeply imbued as he was with science, might have believed an account of the invention and wonderful powers of the steam-engine, which our unscientific countrymen of the last century would have rejected as incredible and absurd (a).

§ 50. A *fifth* basis of evidence is the known and experienced *connection* subsisting *between collateral facts*, or circumstances satisfactorily proved, *and the fact in controversy*. This is merely the legal application, in other terms, of a process familiar in natural philosophy, showing the truth of an hypothesis by its coincidence with existing phenomena. The connections and coincidences, to which we refer, may be either physical or moral ; and the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual, and moral constitution and habits of man. Their force, which will be considered hereafter, depends on their sufficiency to exclude every other hypothesis but the one under consideration. Thus, the possession of goods recently stolen, accompanied with personal proximity in point of time and place, and inability in the party charged, to show how he came by them, would seem naturally, though not necessarily, to exclude every other hypothesis, but that of his guilt. But the possession of the same goods, at another time and place, would warrant no such conclusion, as it would leave room for the hypothesis of their having been lawfully purchased in the course of trade. Similar to this, in principle, is the rule of *noscitur a sociis*, according to which the meaning of certain words, in a written instrument, is ascertained by the context.

(a) Abercrombie on Intell. Pow., Part 2, § 3, pp. 75, 76.

§ 51. In considering this subject, it must always be borne in mind, that in the actual occurrences of human life nothing is inconsistent. Every event which actually transpires, has its appropriate relation and place in the vast complication of circumstances of which the affairs of men consist; it owes its origin to those which have preceded it; it is intimately connected with all others which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others, which succeed (b). In all this there is perfect harmony; so that it is hardly possible for man to invent a story, which, if closely compared with all the actual contemporaneous occurrences, may not be shown to be false. From these causes, minds enlarged by long and matured experience, and close observation of the conduct and affairs of men, may, with a rapidity and certainty approaching to intuition, perceive the elements of truth or falsehood in the face itself of the narrative, without any regard to the narrator. Thus, an experienced judge may instantly discover the falsehood of a witness, whose story an inexperienced jury might be inclined to believe. But though the mind, in these cases, seems to have acquired a new power, it is properly to be referred only to experience and observation.

§ 52. In trials of fact, it will generally be found that the *factum probandum* is either directly attested by those who speak from their own actual and personal knowledge of its existence, or it is to be inferred from other facts, satisfactorily proved. In the former case, the proof rests upon the *second*, *third*, and *fourth* grounds before mentioned; that is, it depends partly upon our faith in human testimony, as sanctioned by experience; which faith will be increased or diminished in proportion to the apparent honesty and intelligence of the witnesses, and their opportunities for observation;—partly upon the exercise of our reason on the consistency of the narratives given by different witnesses; and here the value of the testimony will vary, according to the number of the deponents, and the apparent absence or presence of collusion;—and partly upon the conformity of the testimony with our

(b) 1 St. Ev. 560; 3 Channing's Works, 133, 340.

own experience. In the latter case, that is, when the fact in dispute is to be inferred from other facts satisfactorily established, the proof rests upon the same grounds, with the addition of the experienced connection between the collateral facts thus proved, and the fact which is in controversy; which connection constitutes the *fifth* basis of evidence before stated. The facts proved are, in both cases, directly attested. In the former cases, the proof applies immediately to the *factum probandum*, without any intervening process, and it is therefore called *direct* or *positive* testimony. In the latter case, as the proof applies immediately to collateral facts, supposed to have a connection, near or remote, with the fact in controversy, it is termed *circumstantial*; and sometimes, but not with entire accuracy, *presumptive*. Thus, if a witness testifies that he saw A. inflict a mortal wound on B., of which he instantly died, this is a case of direct evidence; and, giving to the witness the credit to which men are generally entitled, the crime is satisfactorily proved. If a witness testifies that a deceased person was shot with a pistol, and the wadding is found to be part of a letter addressed to the prisoner, the residue of which is discovered in his pocket, here the facts themselves are directly attested; but the evidence they afford is termed *circumstantial*; and from these facts, if unexplained by the prisoner, the jury may, or may not, *deduce*, or *infer*, or *presume* his guilt, according as they are satisfied, or not, of the natural connection between similar facts and the guilt of the person thus connected with them. In both cases, the veracity of the witness is presumed, in the absence of proof to the contrary; but in the latter case there is an additional presumption or inference, founded on the known usual connection between the facts proved, and the guilt of the party implicated. This operation of the mind, which is more complex and difficult in the latter case, has caused the evidence afforded by circumstances to be termed presumptive evidence; though, in truth, the operation is similar in both cases.

§ 53. Much has lately been said and written respecting the comparative value of direct and circumstantial evidence; but as the controversy seems to have arisen from a misapprehension of the real nature and object of testimony, and can moreover lead to no

practical end, it is not here intended to enter into the lists further than to observe, that one argument urged in favour of circumstantial evidence is palpably erroneous. "Witnesses may lie, but circumstances cannot" (c), has been more than once repeated from the bench, and is now almost received as a judicial axiom. Yet certainly no proposition can be more false or dangerous than this. If "circumstances" mean, and they can have no other meaning, those facts which lead to the inference of the fact in issue, they not only can, but constantly do lie; or, in other words, the conclusion deduced from them is often false. Thus, when at Melita the viper fastened on St. Paul's hand, the barbarians said among themselves, "*No doubt* this man is a murderer;" but when they saw that no harm came to him, "they changed their minds, and said that he was a God" (d). Here, both conclusions were alike false. So, in Macbeth, the master poet of nature has described Lenox, Macduff, and the other chieftains as erroneously assuming, first, that the grooms had murdered the king, because "their hands and faces were all badged with blood, so were their daggers, which unwiped were found upon their pillows;" and next that "they were suborned" by the king's two sons, who had "stolen away and fled." It is no answer to say that these are mere instances of hasty and illogical inferences, which display only the ignorance and presumption of the persons by whom they were drawn, and that the "circumstances which cannot lie" are such as *necessarily* lead to a certain conclusion. Who is to decide on this necessity? Clearly those who have also to decide on the fact in issue. Throw a case of circumstantial evidence into the form of a syllogism, and it will be found that the major premiss rests solely on the erring experience of the tribunal to whom it is presented. Besides, these very circumstances must be proved, like direct facts, by witnesses, who are equally capable with others of deceiving or of being deceived. So that in no sense is it possible to say, that a conclusion drawn from circumstantial evidence can amount to absolute certainty, or, in other words, that circumstances cannot lie.

(c) *Annealey v. Lord Anglesea*, 17 How. St. Tr. 1430, per Mountenoy, B.

(d) Acts, xxviii. 3—5.

§ 54. We have said that we do not intend to take any part in the controversy respecting the comparative weight due to direct and circumstantial evidence; still, it may not be without some advantage to point out briefly the dangers against which juries should especially guard when called upon to decide cases supported by each of these species of testimony. For instance, in a case sought to be directly established, the witnesses are usually few, and consequently there is the more reason to apprehend conspiracy and fraud; since two or three persons are far more easily found than a larger number, who, from motives of interest or malignity, will combine to aggrandise themselves or to ruin an opponent. Their story, too, being for the most part simple, is readily concocted and remembered, while its very simplicity renders it extremely difficult, on cross-examination, to detect the imposture. It is on this ground that the uncorroborated statements of single witnesses, especially when they testify to atrocious crimes, such as rape, &c. (e), or are known, like accomplices (f), to be persons of bad character, and to have an interest in the result, have ever been regarded with merited distrust, and are now, in practice, generally deemed insufficient to warrant a conviction.

§ 55. With respect to cases supported by circumstantial evidence, juries should bear in mind, that, although the number of facts drawn from apparently independent sources renders concerted perjury both highly improbable in itself, and easy of detection if attempted (g); yet, the witnesses in such cases are more likely to make unintentional misstatements, than those who give direct testimony. The truth of the facts they attest rests frequently on minute and careful observation, and experience teaches the danger of relying implicitly on the evidence of even the most conscientious witnesses, respecting dates, footprints, handwriting, admissions, loose conversations, and questions of identity. Yet these are the links in the chain of circumstances, by which guilt is in general sought to be established. The number too of the witnesses, who must *all* speak the truth, or some link will be wanting, renders additional caution the more necessary. Besides, it must

(e) 1 Hale, P.C. 635.

(f) R. v. Jones, 2 Camp. 132.

(g) Greenl. on Test. of Evangelists, § 40.

be remembered, that, in a case of circumstantial evidence, the facts are collected by *degrees*. Something occurs to raise a suspicion against a particular party. Constables and police officers are immediately on the alert, and, with professional zeal, ransack every place and paper, and examine into every circumstance which can tend to establish, not his innocence, but his guilt. Presuming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine, if possible, to bag their game. Innocent actions may thus be misinterpreted—innocent words misunderstood; and, as men readily believe what they anxiously desire, facts the most harmless may be construed into strong confirmation of preconceived opinions (*h*). We do not say that this is frequently the case, nor do we intend to disparage the police. The feelings by which they are actuated, are common to counsel, engineers, surveyors, medical men, antiquarians, and philosophers; indeed, to all persons who first assume that a fact or system is true, and then seek for arguments to support and prove its truth.

§ 56. But, admitting that the facts sworn to are satisfactorily proved, a further and a highly difficult duty still remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused (*i*).

(*h*) Ante, § 45.

(*i*) *R. v. Hodge*, 2 Lew. C. C. 227.

CHAPTER V.

OF PRESUMPTIVE EVIDENCE.

§ 57. THE general head of PRESUMPTIVE EVIDENCE is usually divided into two branches, namely, *presumptions of law*, and *presumptions of fact*. PRESUMPTIONS OF LAW consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. The general doctrines of presumptive evidence are not, therefore, peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connection which leads to its recognition by the law, without other proof; the presumption, however, having more or less force, in proportion to the universality of the experience. And this has led to the distribution of presumptions of law into two classes, namely, *conclusive* and *disputable*.

§ 58. *Conclusive*, or, as they are elsewhere termed, imperative, or absolute presumptions of law, are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long-experienced connection, before alluded to, has been found so general and uniform, as to render it expedient for the common good, that this connection should be taken to be inseparable and

universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is, that all corroborating evidence is dispensed with, and all opposing evidence is forbidden (a).

§ 59. Sometimes this common consent is expressly declared, through the medium of the legislature in *statutes*. Thus, by the act of 4 & 5 Vict. c. 21, the recital or mention of a deed of bargain and sale, or lease for a year, in a release executed before the 15th day of May, 1841, is rendered conclusive evidence of the execution of such bargain and sale, or lease (b); and a similar provision is contained in the old Irish Act of 9 Geo. 2, c. 5, § 6. So, under the act relating to the duties on malt, any officer of excise, who suspects that the corn or grain making into malt in any cistern or couch-frame has been trodden or forced together, may cause the same to be thrown out and returned; and if on such return the gauge shall prove to be increased in any greater degree than as follows, viz., five per cent. if the grain has not been emptied from the cistern more than eight hours, six per cent. if more than eight but under sixteen hours, and seven per cent. if sixteen hours or upwards; such increase shall be deemed conclusive evidence of the grain having been trodden down or forced together, and the maltster shall thereupon be convicted (c).

(a) The presumption of the Roman law is defined to be,—“*conjectura, ducta ab eo, quod ut plurimum fit. Ea conjectura vel a lege inducitur, vel a judice. Quæ ab ipsâ lege inducitur, vel ita comparata, ut probationem contrarii haud admittat; vel ut eadem possit elidi. Priorem doctores præsumptionem JURIS ET DE JURE, posteriorem præsumptionem JURIS, adpellant. Quæ a Judice inducitur conjectura, præsumptio HOMINIS vocari solet; et semper admittit probationem contrarii, quamvis, si alicujus momenti sit, probandi onere relevet.*” Hein. ad Pand. Pars iv. § 124. Of the former, answering to our conclusive presumption, Mascardus observes,—“*Super hâc presumptione lex firmum sancit jus, et eam pro veritate habet.*” De Probationibus, Vol. I. Quæst. x. 48. An exception to the conclusiveness of this class of presumptions is allowed by the civil law, when the presumption is met by an admission *in judicio*. See post, § 508, n. (b).

(b) § 2. By § 1, a release executed on or after the 15th May, 1841, is rendered as effectual for the conveyance of freehold estates, as a lease and release by the same parties, provided the instrument “shall be expressed to be made in pursuance of this act,” and shall be stamped with the additional stamp, to which the lease for a year would have been liable.

(c) 7 Will. 4 & 1 Vict. c. 49, § 5. See *R. v. Speller*, 17 L. J., N. S., M. C. 9. For other instances, see post, §§ 64, 94.

§ 60. Thus, too, by the statutes of limitation (*d*), where a debt has been created by simple contract, and has not been distinctly recognised within six years as a subsisting obligation, either in some writing signed by the party chargeable, or by part payment (*e*), no action can be maintained to recover it; that is, it is conclusively presumed to have been paid. So, all actions on the case, other than slander, actions of trespass to goods or land, and actions of detinue or replevin, must be brought within a like period of six years after the cause of action shall have accrued (*f*); and no action can be maintained for an assault or false imprisonment after the lapse of four years (*g*); for slander after the lapse of two years (*h*); or for compensation to the families of persons killed by accident, after twelve months from the death of the deceased (*i*). So actions against persons for anything done by them under the authority or in pursuance of any local and personal act, must be brought within two years after the cause of action shall have accrued, or in the

(*d*) 21 Jac. 1, c. 16; 10 Car. 1, sess. 2, c. 6, Ir. The first act enacts, in § 3, "that all actions of trespass quare clausum fregit, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, *other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants*, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within the time and limitation hereafter expressed, and not after, (that is to say), the said actions upon the case, other than slander, and the said actions for account, and the said actions for trespass, debt, detinue, and replevin, for goods or cattle, and the said action of trespass quare clausum fregit, within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within two years next after the words spoken, and not after." The exception marked in italics has been held by the Court of Exchequer to apply only to an action of account, or perhaps also to an action for not accounting. *Inglis v. Haigh*, 8 M. & W. 769, 777; 9 Dowl. 817, S.C.; and the Court of Common Pleas, without impugning this decision, has clearly confined it to such accounts as would enable either party to maintain such actions. *Cottam v. Partridge*, 4 M. & Gr. 271; 4 Scott, N. R. 819, S.C. In cases where the exception applies, the fact that there has been no item on either side of the account for more than six years is immaterial. *Robinson v. Alexander*, 8 Bligh. N. S. 352, 375, overruling *Barber v. Barber*, 18 Ves. 286. As to the action of account, see *Baxter v. Hosier*, 5 Bing. N. C. 288.

(*e*) 9 Geo. 4, c. 14, § 1, as to which see post, §§ 409, 528, 783—791, 801.

(*f*) See note (*d*), supra.

(*g*) See id.

(*h*) See id.

(*i*) 9 & 10 Vict. c. 93, § 3.

case of continuing damage, within one year after the damage shall have ceased (i).

§ 61. In like manner, the possession of land, for the length of time mentioned in the statutes of limitation, under a claim of absolute title and ownership, constitutes against all persons but the sovereign, a conclusive presumption of a valid grant (j). So also the payment of a modus, or the enjoyment of land tithe-free,

(i) The 5 & 6 Vict., c. 97, § 5 (passed 10th Aug., 1842), after reciting, that "divers acts commonly called public local and personal, or local and personal, acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said acts respectively," enacts, that "the period within which any action may be brought for anything done under the authority or in pursuance of any *such* act or acts shall be two years, or in case of continuing damage, then within one year after such damage shall have ceased."

(j) This period has been limited differently, at different times; but for the last fifty years, it has been shortened, at succeeding revisions of the law, both in England and the United States. By the 3 & 4 Will. 4, c. 27, § 2, all actions to recover land or rent are barred, after twenty years from the time when the right of action accrued; unless, at such time, the plaintiff or the party through whom he claims shall have been under some disability, specified in the act, in which case he is allowed ten years from the ceasing of the disability; provided that in no case shall an action be brought after forty years from the time when the right first accrued, although the period of ten years shall not have expired. (§§ 16 & 17.) This statutory rule applies to a claim for compensation for equitable waste; (see *Duke of Leeds v. Lord Amherst*, 2 Phill. 117;) but the sections just referred to do not apply to spiritual or eleemosynary corporations sole, who are empowered by § 29 to bring actions or suits to recover land or rent within two successive incumbrances and six years, or in case these periods do not amount to sixty years, then within sixty years next after the right of action shall first have accrued. §§ 30—33 limit the time within which advowsons can be recovered, while § 28 enacts, that no mortgagor shall bring a suit to redeem a mortgage but within twenty years from the time when the mortgagee took possession, or from the last written acknowledgment of the mortgagor's title. Mortgagees also may bring actions to recover land at any time within twenty years next after the last payment of any part of the principal or interest secured by the mortgage, (7 Will. 4 & 1 Vict., c. 28). See also 6 & 7 Vict., c. 54, and 7 & 8 Vict., c. 27, which acts extend to Ireland such of the provisions of 3 & 4 Will. 4, c. 27, as were not already in force there, and explain and amend that act. This period of twenty years has been adopted in most of the United States. See 4 Kent, Com. 188, n. a. The same period in regard to the title to real property, or, as some construe it, only to the profits of the land, is adopted in the Hindoo law. See Macnaghten's *Elem. of Hindoo Law*, Vol. I., p. 201.

for the periods specified in the act of 2 & 3 Will. 4, c. 100 (*k*), conclusively bars the right of all parties, even the Queen, to recover tithes, unless such payment has been made, or enjoyment had, under an express written consent or agreement. Thus, too, by the Prescription Act (*l*), the length of time which constitutes the period of legal memory, or, in other words, which affords a legal title, has in respect of incorporeal rights, been definitely fixed; while by the act of 3 & 4 Will. 4, c. 42, English, and 3 & 4 Vict., c. 105, Ir. (*m*),

(*k*) Amended by 4 & 5 Will. 4, c. 83. See *Fellowes v. Clay*, 4 Q. B. 313; 3 G. & D. 407, S.C.; where the Court of Queen's Bench was equally divided on the question, whether a *lay landowner* could sustain a claim of exemption from tithes, by proof of non-payment for one of the periods named in § 1 of 2 & 3 Will. 4, c. 100, without other proof of any legal origin of the exemption. See also *Salkeld v. Johnson*, 2 Com. B. 749; where the Common Pleas was also equally divided on a similar question, when the exemption was claimed, not in respect of all tithes, but of particular articles, some being of modern introduction.

(*l*) The St. 2 & 3 Will. 4, c. 71, limits the period of legal memory as follows:—In cases of rights of common or other profits or benefits arising out of lands, except tithes, rent, and services, *prima facie* to thirty years, and conclusively to sixty years, unless it shall appear that such rights were enjoyed by some consent or agreement expressly given or made by deed or writing (§ 1); in cases of aquatic rights, ways, or other easements, *prima facie* to twenty years, and conclusively to forty years, unless it shall be proved, in like manner, by written evidence, that the same were enjoyed by consent of the owner (§ 2); and in cases of lights, conclusively to twenty years, unless it shall be proved, in like manner, that the same were enjoyed by consent (§ 3). § 4 directs that the before-mentioned periods shall be deemed those next before some suit or action respecting the claims, and further defines what shall amount to an interruption. § 7 provides for parties who are under legal disabilities. In the United States, the courts are inclined to adopt the periods mentioned in the statutes of limitation, in all cases analogous in principle. *Coolidge v. Learned*, 8 Pick. 504; *Melvin v. Whiting*, 10 Pick. 295; *Ricard v. Williams*, 7 Wheat. 110.

(*m*) § 3, of 3 & 4 Will. 4, c. 42, and § 32, of 3 & 4 Vict., c. 105, Ir., respectively enact, that actions of debt for rent, upon an indenture of demise, actions of covenant or debt upon any bond or other specialty, and actions of debt or *scire facias* upon recognizance, shall be brought within twenty years after the cause of such actions or suits; actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estate, or for an escape, or for money levied on any *scire facias*, within six years after the cause of such actions or suits; and actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, within two years after the cause of such actions: "Provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited." § 4 of the one act, and § 33 of the other, provide for parties under legal disabilities, and §§ 5 & 34 state the effect of an acknowledgment in writing or part payment.

the time within which actions of covenant and debt on specialties, and actions for penalties may be brought, is expressly limited. So, under the recent act for regulating suits relating to meeting-houses and other property held for religious purposes by dissenters, *the usage for twenty-five years* immediately preceding any such suit, shall be taken as conclusive evidence that the religious doctrines, opinions, or mode of worship, which for that period have been taught or observed in these houses, may properly be taught or observed, provided the contrary is not declared by the instrument declaring the trusts of such houses, either in express terms or by reference to some other document (*m*).

§ 62. There are also many statutes which limit the period within which particular offenders may be prosecuted. Of these, the act of 7 Will. 3, c. 3, is the most remarkable, as it enacts, that no person shall be prosecuted for any high treason or misprision within the act, other than a design or attempt to assassinate the sovereign, unless the bill of indictment be found within three years after the commission of the offence (*n*). So, all suits, indictments, or informations, for any offence against the act for the prevention of smuggling, or any other act relating to the customs, must be exhibited within three years, if brought in a superior court, and, if brought before one or more justices, within six months, next after the date of the offence committed (*o*). So, the prosecution for every offence against the night-poaching act, must be commenced within six calendar months, if punishable upon summary conviction, and within twelve calendar months, if punishable upon indictment, or otherwise than upon summary conviction (*p*). The commencement of the prosecution here spoken of is not the preferring the indictment, but the laying an information, and the obtaining a warrant of apprehension; or at least the issuing a warrant of commitment; and therefore, where the prisoner was apprehended and committed within the twelve months, though the indictment was preferred after the expiration of that term, it was held that the prosecution was commenced in time (*q*). Whether the preferring an indictment which is

(*m*) 7 & 8 Vict., c. 45, § 2.

(*n*) §§ 5 & 6; extended to Scotland, by 7 Ann., c. 21. See Fost., C. L. 249.

(*o*) 8 & 9 Vict., c. 87, § 134. (*p*) 9 Geo. 4, c. 69, § 4; 7 & 8 Vict., c. 29.

(*q*) R. v. Brooks, 2 C. & Kir. 402, by all the judges; R. v. Austin, 1 id. 621.

ignored, would be deemed such a commencement of the prosecution as would warrant the conviction of the party upon a subsequent indictment, preferred more than a year after the offence was committed, may admit of more doubt; and the point, though discussed, has never been determined (*r*). Again, every prosecution under the English Marriage Act (*s*), must be commenced within three years after the offence committed, and the prosecution for every offence punishable upon summary conviction by virtue of this act, or of the act for registering births, deaths, and marriages (*t*), or of 7 Will. 4 & 1 Vict., c. 22, which was passed to amend these acts, must be commenced within three months after the commission of such offence (*u*). So, under the act for marriages in Ireland, and the registering of such marriages, the limitations of prosecutions are fixed in like manner at three years and three months, according as the offences are punishable upon indictment or summary conviction (*v*). So also, no prosecution against any person for making a false declaration, in order to procure a marriage out of the district in which the parties dwell, shall take place after the expiration of eighteen calendar months from the solemnisation of such marriage (*w*). Again, the prosecution for every offence punishable on summary conviction under the act relating to larcenies (*x*), or the act relating to malicious injuries (*y*), must be commenced within three calendar months after the commission of the offence. Clauses of a similar nature will be found to be introduced in a vast variety of other statutes, to which it is here considered unnecessary to make particular reference.

§ 63. It may admit of a serious doubt, whether all, or, indeed, the majority of, these statutes of limitation depend on the doctrine of presumption. Some of them do so undoubtedly, but others appear to rest solely on the broad ground of general expedience and justice. *Interest reipublicæ ut sit finis litium*, is a maxim sanctioned by all civilised states: and the legislature, in passing most of these statutes, probably never intended to recognise any legal pre-

(*r*) *R. v. Killminster*, 7 C. & P. 228.

(*t*) 6 & 7 Will. 4, c. 86.

(*v*) 7 & 8 Vict., c. 81, §§ 48 & 78.

(*x*) 7 & 8 Geo. 4, c. 29, § 64.

(*s*) 6 & 7 Will. 4, c. 85, § 41.

(*u*) 7 Will. 4 & 1 Vict., c. 22, § 31.

(*w*) 3 & 4 Vict., c. 72, § 4.

(*y*) 7 & 8 Geo. 4, c. 30, § 29.

sumption, but their simple object was to check protracted litigation. When a party has been in undisputed possession of property for a considerable length of time, it is harsh to deprive him of that, which, however obtained, has now acquired the character of a vested interest. No presumption of a former grant is necessary to give validity to his title. It rests on the fact of long uninterrupted enjoyment. So, when a person has foregone a claim for many years, there is no need for presuming that he has, in reality, been satisfied; it is sufficient to say, that his right to recover is lost by his own negligence. Indeed, the statute of James, which has been held not to discharge the debt, but merely to bar the remedy, is strongly confirmatory of these views (*z*). Before leaving this subject, we cannot refrain from introducing a celebrated passage from one of Lord Plunkett's speeches, relative to the statutes of limitation. "If time," says his lordship, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hour-glass, by which he metes out incessantly those portions of duration, which render needless the evidence that he has swept away" (*a*).

§ 64. In other cases, the common consent, by which this class of legal presumptions is established, is declared through the medium of the judicial tribunals, it being the *common law* of the land; and these decisions of the courts are respected, equally with the enactments of the legislature, as authoritative declarations of an imperative rule of law, against the operation of which no averment or evidence is received. Thus the courts conclusively presume that every sane person, above the age of fourteen, is acquainted with the criminal law of the land; and the maxim "*ignorantia juris, quod quisque tenetur scire, neminem excusat*," is uniformly recognised in this country, as it formerly was in ancient Rome (*b*). Indeed, this doctrine has been carried so far, as to include the case of a foreigner, who was here charged with a crime, which was no offence

(*z*) *Spears v. Hartly*, 3 Esp. 81; *Higgins v. Scott*, 2 B. & Ad. 413.

(*a*) See *Statesmen of the Time of George III.*, by Lord Brougham, 3rd Ser., p. 227, note.

(*b*) 1 Russ. C. & M. 25; 1 Hale 42; Ff. 22, 6, 9.

in his own country (*b*). In like manner, a sane man of the age of discretion, is conclusively presumed to contemplate the natural and probable *consequences* of his own acts; and therefore the intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon (*c*). So, on an indictment for cutting with intent to do the prosecutor some grievous bodily harm (*d*), the judges held that the prisoner was rightly convicted, though it appeared that his real intent was to wound another person (*e*); and an intent to defraud a particular party will be conclusively presumed on an indictment for forgery, provided the defrauding of such party would be the natural result of the prisoner's act, if successful (*f*). The law, in such a case, will not relax the rule, even though it should be proved that the prisoner did not entertain the intention charged (*g*). In like manner, on a charge of arson for setting fire to a mill, an intent to injure or defraud the mill-owners will be conclusively inferred from the wilful act of firing (*h*); and if a

(*b*) *R. v. Esop*, 7 C. & P. 456, per Bosanquet & Vaughan, Js.

(*c*) 1 Russ. C. & M. 515—518; *R. v. Dixon*, 3 M. & Sel. 15. But if death does not ensue, till a year and a day, (that is, a full year,) after the stroke, it is conclusively presumed, that the stroke was not the sole cause of the death, and it is not murder. 4 Bl. Com. 197; Glassford Ev. 592. The doctrine of presumptive evidence was familiar to the Mosaic Code; even to the letter of the principle stated in the text. Thus, it is laid down in regard to the manslayer, that "if he smite him with an *instrument of iron*, so that he die,"—or, "if he smite him with throwing a *stone wherewith* he may die, and he die,"—or, "if he smite him with a *hand-weapon of wood wherewith* he may die, and he die; he is a murderer." See Numb. xxxv. 16, 17, 18. Here, every instrument of *iron* is conclusively taken to be a deadly weapon; and the use of any such weapon raises a conclusive presumption of malice. The same presumption arose from *lying in ambush*, and thence destroying another.—*Ib.* v. 20. But, in other cases, the existence of malice was to be proved, as one of the facts in the case; and in the absence of express malice, the offence was reduced to the degree of manslaughter, as at the common law.—*Ib.* v. 21, 22, 23. This very reasonable distinction seems to have been unknown to the Gentoo Code, which demands life for life, in all cases, except where the culprit is a Brahmin. "If a man deprives another of life, the magistrate shall deprive that person of life."—Halhed's Gentoo Laws, b. xvi. § 1, p. 233.

(*d*) Under the repealed act of 43 Geo. 3, c. 58.

(*e*) *R. v. Hunt*, 1 Moo. C. C. 93.

(*f*) *R. v. Beard*, 8 C. & P. 148, per Coleridge J.; *R. v. Hill*, id. 276, by all the judges; *R. v. Cooke*, id. 582.

(*g*) *R. v. Sheppard*, R. & R. 169; *R. v. Mazagora*, id. 291; *R. v. Geach*, 9 C. & P. 499. The prisoner may also be convicted on a count charging the real intent, *R. v. Hanson*, C. & Marsh. 334, by all the judges.

(*h*) *R. v. Farrington*, R. & R. 207; *R. v. Philp*, 1 Moo. C. C. 263.

person be indicted for maliciously injuring some work of art in a museum or other repository, it will be unnecessary to prove that he was actuated by any malicious motive conceived against the owner, his malice being implied from his unlawful conduct (*h*). The same doctrine should, it seems, on principle, apply to all other crimes.

§ 65. There are several decisions, however, which are opposed to the general adoption of this rule, and which tend to show that, in respect of those statutory offences, whose character varies according to the intent with which they are perpetrated, the *real* intention of the prisoner must be left to the jury to be inferred from the facts proved. Thus, on an indictment for cutting (*i*), where the intent laid in the several counts was to murder, to disable, and to do grievous bodily harm, but the intent found by the jury was to prevent being apprehended, the judges held that a conviction could not be sustained, though the prisoner had inflicted a serious wound (*j*). So, where a party was charged with inflicting an injury dangerous to life with intent to murder, Mr. Justice Patterson held, in one case (*k*), that the jury must be satisfied that the prisoner, at the time he committed the assault, had formed a deliberate intention of murdering his victim; but in a subsequent case (*l*), the same learned judge observed, that the jury *might* infer such intent from the circumstance that, had death ensued, the crime would have amounted to murder. Again, on an indictment under the act of 9 Geo. 4, c. 31, charging the prisoner with shooting at the prosecutor with intent to murder him, Mr. Justice Littledale allowed the jury to pronounce a verdict in accordance with the actual intent, which was to kill another person, and the prisoner was, consequently, acquitted (*m*). The principle of this

(*h*) 8 & 9 Vict., c. 44, §§ 1 & 2.

(*i*) Under the repealed act of 43 Geo. 3, c. 58.

(*j*) *R. v. Duffin*, R. & R. 365. This case is badly reported, and perhaps the decision turned upon the ground that the attempted apprehension was not lawful.

(*k*) *R. v. Cruse*, 8 C. & P. 545.

(*l*) *R. v. Jones*, 9 C. & P. 260.

(*m*) *R. v. Holt*, 7 C. & P. 518. The learned judge observed, in summing up, "If this had been a case of murder, and the prisoner intending to murder one person, had, by mistake, murdered another, he would be equally liable to be found guilty. The question, however, may be different on the construction of this act of Parliament."

decision has also been recognised by Barons Parke and Alderson, in a case where the prisoner was charged, under 7 Will. 4 & 1 Vict., c. 85, § 2, with causing poison to be taken by the prosecutor with intent to murder him, and it appeared that the prisoner's real intention was to poison another party (*n*).

§ 66. Notwithstanding these decisions, and the high reputation of the judges by whom they were pronounced, it is submitted that the distinction which they tend to establish is founded on no sound principle, but goes far towards frittering away one of the most valuable presumptions known to the criminal law. It must also be borne in mind, that other judges of great experience in the administration of criminal justice have refused to recognise this distinction (*o*). But whether in these statutory offences the actual intent is to be found by the jury, or the implied intent is to be presumed by the law, it is agreed on all hands to be immaterial whether the intent charged be the principal or subordinate motive which instigated the commission of the crime. Thus, where the jury found that the prisoner had wounded the prosecutor with the view of preventing his lawful apprehension, but that, *in order to effect that purpose*, he intended to do him some grievous bodily harm, the judges held that the conviction was right on a count charging the latter offence (*p*). The same rule has been recognised where the immediate object of the criminal was to rob the party he wounded, and the wound was inflicted as the means of effecting the robbery (*q*).

§ 67. The presumption that a party intends the natural consequences of his acts, is not confined to criminal matters, but extends equally to his civil responsibilities. Thus, the deliberate publication of calumny, which the publisher knows to be false, or has no reason to believe to be true, raises, under the plea of "not guilty" to an action for libel (*r*), a conclusive presumption of

(*n*) *R. v. Ryan*, 2 M. & Rob. 213.

(*o*) *R. v. Lewis*, 6 C. & P. 161, per Gurney, B. ; *R. v. Jarvis*, 2 M. & Rob. 40, per id. ; notes (*e*), (*f*), (*g*), (*h*), to § 64, ante. (*p*) *R. v. Gillow*, 1 Moo. C. C. 85.

(*q*) *R. v. Bowen*, C. & Marsh. 149, per Coleridge, J.

(*r*) See 6 & 7 Vict., c. 96.

malice (*s*). So, if a party makes a representation, which he knows to be false, and injury ensues to another, the law, whatever his real motives may have been, will infer that he has been actuated by a fraudulent or malicious intent (*t*). So, the wilful neglect of a defendant to plead within the time appointed by law, is taken conclusively against him, as a confession of the plaintiff's right of action (*u*).

§ 68. Conclusive presumptions are also made in favour of judicial proceedings. Thus, the *records* of a court of justice are presumed to have been correctly made (*v*); a party to the record is presumed to have been interested in the suit (*w*); and after verdict, it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, though they are not expressly and distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in fair and reasonable intendment (*x*). So, the notes taken by the judge at *Nisi Prius* are presumed to be correct, and no party is allowed to raise before the court in *Banc* any question respecting the rejection of evidence at the trial, unless it appear from these notes that the evidence was formally tendered (*y*). The presumption will also be made,

(*s*) *Haire v. Wilson*, 9 B. & C. 643; *R. v. Shipley*, 4 Doug. 73, 177, per Ashurst, J.; *Fisher v. Clement*, 10 B. & C. 475, per Lord Tenterden; *Baylis v. Lawrence*, 11 A. & E. 925, per Patteson, J.; *Rodwell v. Osgood*, 3 Pick. 379.

(*t*) *Tapp v. Lee*, 3 B. & P. 371; *Roster v. Charles*, 6 Bing. 396; 7 Bing. 105; 4 M. & P. 61, 741, S. C.; *Pontifex v. Bignold*, 3 M. & Gr. 63.

(*u*) Laws of this sort are generally regulated by statutes, or by the rules of practice established by the courts; but the principle evidently belongs to general jurisprudence. So is the Roman law: "*Contumacia eorum, qui jus dicenti non obtemperant, litis damno coercetur.*" Dig. lib. 42. t. 1. l. 53. "*Si citatus aliquis non compareat, habetur pro consensione.*" Mascard. De Prob. vol. iii. p. 253, concl. 1159, n. 26. See further on this subject post, under head of *Admissions*.

(*v*) *Reed v. Jackson*, 1 East, 355; *Ramsbottom v. Buckhurst*, 2 M. & Sel. 567, per Lord Ellenborough; 1 Inst. 260; *R. v. Carlile*, 2 B. & Ad. 367—369, per Lord Tenterden. *Res judicata pro veritate accipitur*. Dig. lib. 50. t. 17. l. 207.

(*w*) *Stein v. Bowman*, 13 Pet. 209.

(*x*) *Jackson v. Pesked*, 1 M. & Sel. 237, per Lord Ellenborough. *Stephen* on Pl. 162—164; *Spieries v. Parker*, 1 T. R. 141; *Davis v. Black*, 1 Q. B. 911, 912, per Lord Denman, C. J., and Patteson, J.; 1 G. & D. 432, S. C.; *Harris v. Goodwyn*, 2 M. & Gr. 405; 2 Scott, N. R. 459; 9 Dowl. 409, S. C.

(*y*) *Gibbs v. Pike*, 9 M. & W. 351, 360, 361, per Lord Abinger, and Alderson, B.; 1 Dowl. N. S. 409, S. C.

after twenty years, in favour of every judicial tribunal acting within its jurisdiction, that all persons concerned had due notice of its proceedings (z). The solemnity of an act done, though not done in court, will also sometimes raise a conclusive presumption in its favour. Thus a bond, or other specialty, is presumed to have been made upon good *consideration*, so long as the instrument remains unimpeached (a).

§ 69. To this class of legal presumptions may be referred one of the applications of the rule, *Ex diuturnitate temporis omnia præsuntur ritè et solemniter esse acta*; namely, that which relates to transactions, not of record, the proper evidence of which, after the lapse of some years, it is often impossible, or extremely difficult, to produce. The rule itself is nothing more than the principle of the statutes of limitation, expressed in a different form, and applied to other subjects. Thus, it has been held in the United States, that, where an authority is given by law to executors, administrators, guardians, or other officers, to make sales of lands, upon being duly licensed by the courts, and they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings; the lapse of sufficient time, (which in most cases is fixed at thirty years,) (b) raises a conclusive presumption that all the legal formalities of the sale were observed. The license to sell, as well as the official character of the party, being provable by record or judicial registration, must in general be so proved; and the deed is also to be proved, in the usual manner; it is only the intermediate proceedings that are pre-

(z) *Brown v. Wood*, 17 Mass. 68. A former judgment, still in force, by a court of competent jurisdiction, in a suit between the same parties, is conclusive evidence, upon the matter directly in question in such suit, in any subsequent action or proceeding. *Duchess of Kingston's case*, 11 How. St. Tr. 261; *Ferrer's case*, 6 Co. 7; the effect of judgments will be farther considered hereafter, in the Chapter on *Public Documents*.

(a) *Lowe v. Peers*, 4 Burr. 2225; 3 St. Ev. 930; Story on Bills of Ex., § 16. See post, § 103.

(b) See *Pejepscot Prop's v. Ransom*, 14 Mass. 145; *Blossom v. Cannon*, ib. 177; *Colman v. Anderson*, 10 Mass. 105. In some cases, twenty years has been held sufficient. Thus, after partition of lands by an incorporated land-company, and a several possession, accordingly, for twenty years, it was presumed that its meetings were duly notified. *Society, &c. v. Wheeler*, 1 New Hamp. Rep. 310.

sumed. *Probatis extremis, præsumentur media* (c). The reason of this rule is found in the great probability, that the necessary intermediate proceedings were all regularly had, resulting from the lapse of so long a period of time, and the acquiescence of the parties adversely interested; and in the great uncertainty of titles, as well as the other public mischiefs, which would result if strict proof were required of facts so transitory in their nature, and the evidence of which is so seldom preserved with care. Hence it does not extend to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for, and supplied by secondary evidence (d). Neither does the rule apply to cases of prescription (e).

§ 70. The same principle applies to the proof of the execution of *ancient deeds and wills*. Where these instruments are thirty years old, and are unblemished by any alterations, they are said to prove themselves; the bare production thereof is sufficient; the subscribing witnesses being presumed to be dead. This presumption, so far as the present rule of evidence is concerned, is not affected by proof that the witnesses are living (f), and it seems, even actually in court (g); nor, in the case of wills, by showing that the testator died within the thirty years (h). But it must appear that the instrument comes from such custody, as, though not strictly proper in point of law, is sufficient to afford a reasonable presumption in favour of its genuineness (i); and that it is otherwise free from just grounds of suspicion (j). Whether, if the deed be a conveyance of real estate, the party is bound first to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight of opinion seems in the

(c) 2 Ersk. Inst. 782.

(d) *Brunswick v. M'Kean*, 4 Greenl. 508; *Hathaway v. Clark*, 5 Pick. 490.

(e) *Eldridge v. Knott*, 1 Cowp. 215; *Mayor of Kingston v. Horner*, ib. 102.

(f) *Doe v. Burdett*, 4 A. & E. 19.

(g) Per Yates, J., as cited by Lord Kenyon in *Marah v. Collnett*, 2 Esp. 686.

(h) *Doe v. Wolley*, 8 B. & C. 22; 3 C. & P. 702, S. C.

(i) *Doe v. Samples*, 8 A. & E. 151; *Bp. of Meath v. Marq. of Winchester*, 3 Bing. N. C. 200, 201, per Tindal, C. J., representing all the judges in Dom. Proc.; 10 Bligh, 462—464, S. C.

(j) *Roe v. Rawlings*, 7 East, 291.

negative, as will hereafter be more fully explained (*k*). It is also questionable whether the rule applies to an instrument bearing the seal of a court or a corporation; "because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for after such a lapse of time, yet the seals of courts and corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed" (*l*).

§ 71. This rule is not confined to deeds, and wills, but extends equally to *letters* (*m*), *entries* (*n*), *receipts* (*o*), *settlement certificates* (*p*), and indeed to all other written documents; and provided that these purport to be thirty years old, and come from the proper custody, the signatures and handwriting need not be proved. In *Wynne v. Tyrwhitt* the court observed, that this rule was founded "on the great difficulty, nay impossibility, of proving the handwriting of the party after such a lapse of time" (*q*).

§ 72. *Estoppels* may be ranked in this class of presumptions. A man is said to be estopped, when he has done or permitted some act, which the policy of the law will not allow him to gainsay or deny. "The law of estoppel is not so unjust or absurd, as it has been too much the custom to represent" (*r*). Its foundation is laid in the obligation, which every man is under, to speak and act according to the truth of the case, and in the policy of the law, to prevent the great mischiefs resulting from uncertainty, confusion, and want of confidence, in the intercourse of men, if they were permitted to deny that which they have deliberately and solemnly asserted and received as true. The doctrine of estoppels has, how-

(*k*) See post, Chapter on *Ancient Possession*.

(*l*) Per Lord Tenterden, C. J., in *R. v. Bathwick*, 2 B. & Ad. 648.

(*m*) *Doe v. Beynon*, 12 A. & E. 431; 4 P. & D. 193, S. C., recognising *Bere v. Ward*, 2 Ph. Ev. 204.

(*n*) *Wynne v. Tyrwhitt*, 4 B. & Al. 376.

(*o*) *Bertie v. Beaumont*, 2 Price, 308.

(*p*) *R. v. Ryton*, 5 T. R. 259; *R. v. Netherthong*, 2 M. & Sel. 337. In these cases no proof of the custody was given in evidence, but the court held this immaterial.

(*q*) 4 B. & Al. 377.

(*r*) Per Taunton, J., 2 A. & E. 291.

ever, been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth; for it is rather to be supposed, that that is true, which the opposite party has already solemnly recited; but because the estoppel *may* exclude the truth. Hence estoppels must be certain to every intent; for no one shall be prevented from setting up the truth, unless it be in plain contradiction to his former allegations and acts (s).

§ 73. These last words extend, not only to a man's own allegations and acts, but also to those of *all persons through whom he claims* (t); or, to express the same sentiment in the technical language of the law, *estoppels* are equally *binding upon parties and privies* (u). Lord Coke has divided privies into three classes; first, privies in blood, as heirs; secondly, privies by estate, as feoffees, leasees, assignees, &c.; and, thirdly, privies in law, "as the lord by escheat, the tenant by the courtesy, the tenant in dower, the incumbent of a benefice" (v), husbands suing or defending in right of their wives (x), executors and administrators (y). In all these and the like cases, the law, acting upon the wise principle, *qui sentit commodum, sentire debet et onus*, provides that the privy shall stand in no better position than the party through whom he derives his title; but that, if the latter is not at liberty to contradict what he has formerly said or done, the former shall be subject to a like disability (z). One exception, however, to this rule, is admitted in favour of those privies, who would themselves be aggrieved or defrauded by the conduct of the party through whom they claim. For instance, where a man executed a deed with the fraudulent intent of defeating the statutes of mortmain, the court held that his heir-at-law was not estopped from questioning the validity of the indenture, since his claim to the lands was founded, not on the deed, but on his title by descent (a).

(s) *Bowman v. Taylor*, 4 N. & Man. 264, and 2 A. & E. 278, 289, per Lord Denman; *Ib.* 291, per Taunton, J.; *Lainson v. Tremere*, 1 A. & E. 792; 3 N. & Man. 603, S. C.; *Pelletreau v. Jackson*, 11 Wend. 117; 4 Kent, Com. 261, n.; *Carver v. Jackson*, 4 Peters, 83. (t) B. N. P. 233.

(u) See post, § 558, et seq. as to admissions by privies.

(v) Co. Lit. 352 (a).

(x) *Outram v. Morewood*, 3 East, 346.

(y) *R. v. Hebdon*, And. 389.

(z) *Taylor v. Needham*, 2 Taunt. 278.

(a) *Doe v. Lloyd*, 5 Bing N. C. 741. See *Smyth v. Wilson*, 2 Jebb & Symes, 660.

§ 74. Estoppels are usually divided into three classes ; namely, those by matter of record, those by deed, and those in pais (*a*). The first class will be more conveniently treated, when we come to discuss the admissibility and effect of judgments (*b*), which, being the most extensive species of records, usually give rise to questions of this nature ; but it may be here observed, that a judgment *inter partes*, or a deed, would seem to be now only *conclusive* as an estoppel, where the matter of estoppel appears on the record, and is met by a demurrer (*c*), or where it has been *expressly pleaded*, by way of estoppel, or, perhaps, where there is no opportunity of so pleading it (*d*). If a party, having such an opportunity, does not avail himself of it, the court will conclusively presume that he has intended to waive all benefit derivable from the estoppel, and will leave the jury to form their own conclusion from the facts presented to them in evidence (*e*). The general adoption of this rule renders it unnecessary to treat the doctrine of estoppels at any great length in the present treatise.

§ 75. Whether a party is estopped from avoiding his deed by proving that it was executed for a fraudulent purpose, is not perfectly clear upon the authorities. In one case (*f*), where a man, in order to give his brother a colourable qualification to kill game, conveyed some lands to him, the court held that his widow could not avoid this conveyance in an action of ejectment brought against her by the brother ; and in the subsequent case of Prole

(*a*) Co. Lit. 352 *a* ; 2 Smith's Lead. C. 437.

(*b*) See post, §§ 1207, 1216, et seq.

(*c*) Bradley v. Beckett, 7 M. & Gr. 994.

(*d*) 2 Smith's Lead. C. 443—445 and 57. The whole of Mr. Smith's note, from p. 436 to 460, should be carefully perused. It contains an elaborate exposition of a very difficult branch of the law. See also Trevivan v. Lawrence, 1 Salk. 276 ; 2 Smith's L. C. 435, S. C. ; Magrath v. Hardy, 4 Bing. N. C. 782. In America, a judgment is conclusive when offered in evidence, if there has been no opportunity of pleading the matter of estoppel in bar. See Howard v. Mitchell, 14 Mass. 241 ; Adams v. Barnes, 17 Mass. 365.

(*e*) Outram v. Morewood, 3 East, 346, 365 ; Vooght v. Winch, 2 B. & A. 662 ; Doe v. Huddart, 2 C. M. & R. 316 ; 5 Tyrwh. 846, S. C. ; Doe v. Seaton, 2 C. M. & R. 732, per Parke, B. ; Doe v. Wright, 10 A. & E. 763 ; 1 P. & D. 673, S. C. ; Magrath v. Hardy, 4 Bing. N. C. 782 ; 6 Scott, 627, S. C., as to estoppels by matter of record ; Wilson v. Butler, 4 Bing. N. C. 748 ; Bowman v. Rostron, 2 A. & E. 295 ; 4 N. & M. 452, S. C. ; Carpenter v. Buller, 8 M. & W. 212, as to estoppels by deed.

(*f*) Doe v. Roberts, 2 B. & A. 367.

v. Wiggins, Sir Nicholas Tindal observed that that decision rested on the fact, that "the defence set up was *inconsistent* with the deed" (*g*). The case, however, can scarcely be supported by this circumstance, for in an action of ejectment by the grantee of an annuity, to recover premises on which it was secured, the grantor was allowed to show that the premises were of less value than the annuity, and consequently that the deed required enrolment, although he had expressly covenanted in the deed that the premises were of greater value (*h*). So, also, where a bond has been given, or a covenant made, for an illegal consideration, the obligor or covenantor is not debarred from avoiding the instrument by pleading and proving the illegality (*i*); and this too, though a legal, but untrue consideration, is stated on the face of the deed (*k*). Indeed, the better opinion seems to be, that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving these facts which render the instrument void *ab initio* (*l*): for although a party will thus, in certain cases, be enabled to take advantage of his own wrong (*n*), yet this evil is of a trifling nature in comparison with the flagrant evasion of the

(*g*) 3 Bing N. C. 235.

(*h*) *Doe v. Ford*, 3 A. & E. 649. In this case a question was raised whether a covenant, under any circumstances, is such a declaration as to estop a party from afterwards disputing the fact covenanted for, but the point was left undecided. In America a party may, in some cases, be estopped by a covenant. Thus a covenant of warranty estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant; *Terrett v. Taylor*, 9 Cranch, 43; *Jackson v. Matadorf*, 11 Johns. 97; *Jackson v. Wright*, 14 Johns. 193; *M'Williams v. Nisby*, 2 Serg. & Raw. 515; *Somes v. Skinner*, 3 Pick. 52; but he is not estopped by a covenant, that he is seised in fee and has good right to convey; *Allen v. Sayward*, 5 Greenl. 227; for any seisin in fact, though by wrong, is sufficient to satisfy this covenant, its import being merely this, that he has the seisin in fact, at the time of conveyance, and thereby is qualified to transfer the estate to the grantee.

(*i*) *Prole v. Wiggins*, 3 Bing. N.C. 230; 3 Scott, 607, S.C.; *Collins v. Blantern*, 2 Wils. 341; *Gas Light & Coke Co. v. Turner*, 5 Bing. N.C. 666; judgt. aff. in Ex. Ch., 6 Bing. N.C. 324; *Stratford & Moreton R. Co. v. Stratton*, 2 B. & Ad. 518; *Hill v. Manchester Waterworks Co.* id. 552, 553.

(*k*) *Paxton v. Popham*, 9 East, 419.

(*l*) *Id.*

(*n*) *Doe v. Ford*, 3 A. & E. 654, per Lord Denman; *Doe v. Howells*, 2 B. & Ad. 747.

law, that would result from the adoption of an opposite rule. It seems scarcely necessary to add that a party is not estopped by his deed, if he executed it while, from duress, infancy, or other cause, he was incapable of making a valid contract, or if he was deceived by the fraudulent misrepresentations or acts of other parties (o).

§ 76. It seems at one time to have been thought, that trustees acting for the benefit of the public would not be estopped from disputing the validity of their deeds, because, if they were, the innocent parties, on whose behalf they were acting, might be seriously injured (p). This doctrine, however, is now distinctly confined to those cases in which the trustees for the public have, in their dealings with another party, violated a public act, the contents of which are presumed to be known to such party. Therefore, where a bridge act authorised commissioners to mortgage the tolls, and enacted that the mortgagees should have no preference by reason of priority, the court held that, in an action of ejectment brought by a mortgagee of the tolls against the commissioners, the defendants were estopped from setting up the fact of an earlier mortgage to defeat the legal estate of the lessor of the plaintiff. In this case, no presumption could be made as to the mortgagee's knowledge of the *fact* that a previous mortgage had been made; and the judges considered that there was no authority for holding, that trustees for a public purpose were in any peculiar state of protection on such a point (r). It should be here noticed, that, though an estoppel may bind a person acting in one capacity, it does not necessarily follow that it will have a similar effect, when such party is sustaining a totally different character (s). Thus, where an executor *de son tort* verbally agreed with the landlord of the intestate to deliver up the premises demised and afterwards took out letters of administration, he was held not concluded from bringing an action of ejectment against the landlord, who had actually

(o) *Hayne v. Maltby*, 3 T. R. 438.

(p) *Fairtitle v. Gilbert*, 2 T. R. 169; *Doe v. Hares*, 4 B. & Ad. 440, per Little-dale, J.

(r) *Doe v. Horne*, 3 Q. B. 757, 766, 767; *R. v. White*, 4 Q. B. 111, 112.

(s) 2 *Smith's Lead. C.* 442; *Robinson's case*, 5 Rep. 32 b.; *Com. Di. Estoppel*, C.; 2 *Co. Lit.* 365, (b.); *Smyth v. Wilson*, 2 *Jebb. & Symes*, 660.

obtained possession under the agreement (t). But if "an heir apparent, having only the hope of succession, conveys, during the life of his ancestor, an estate, which afterwards descends upon him, although nothing passes at that time, yet, when the inheritance descends upon him, he is estopped to say that he had no interest at the time of the grant" (x). The distinction between these two cases appears to be this, that, in the former, the party not estopped was acting for the benefit of others; in the latter, the party estopped was *sui juris*.

§ 77. In regard to estoppels by deed, a party is not prevented from disputing the correctness of that which is not an essential averment, but is *mere description*; such, for instance, as the date of the deed; the quantity of land; its nature, whether arable or meadow; the amount of tonnage of a vessel, or the like; for these are but incidental and collateral to the principal matter, and may be supposed not to have received the deliberate attention of the parties (y). It seems, however, that, in this country, if a deed of conveyance distinctly state in the operative part that the consideration money has been received, the fact of payment, and the amount paid, are conclusively presumed (z); although a receipt endorsed upon the deed will not in itself amount to an estoppel (a). In America, though the party is estopped from denying the conveyance, and that it was for a valuable consideration, the weight of authority is in favour of treating the statement in the deed as only *prima facie* evidence of the amount paid, in an action of covenant by the grantee to recover back the consideration, or in an action of

(t) *Doe v. Glenn*, 1 A. & E. 49; 3 N. & M. 837, S. C. See also *Middleton's case*, 5 Rep. 21; *Lyons v. Mulderry*, Hayes R. 530; *Kirwan v. Gorman*, 9 Ir. Eq. R. 154.

(s) *Hayne v. Maltby*, 3 T. R. 441, per Lord Kenyon.

(y) *Com. Di. Estoppel*, A. 2; *Yelv.* 227 (by Metcalf), n. 1; *Doddington's case*, 2 Co. 33; *Skipworth v. Green*, 8 Mod. 311; 1 Stra. 610, S. C.

(z) *Shelley v. Wright*, Willes, 9; *Cossens v. Cossens*, id. 25; *Rowntree v. Jacob*, 2 Taunt. 141, in which last case there were highly suspicious circumstances tending to show that the consideration money had not in fact been paid; *Baker v. Dewey*, 1 B. & C. 704; *Lampon v. Corke*, 5 B. & A. 606; *Hill v. Manchester Waterworks Co.*, 2 B. & Ad. 544.

(a) *Lampon v. Corke*, 5 B. & A. 611, per Holroyd, J., 612, per Best, J.; *Stratton v. Rastall*, 2 T. R. 366.

assumpsit by the grantor, to recover the price which is yet unpaid (c).

§ 78. The question how far parties are bound by *recitals in deeds* (d) has of late years been much discussed; and the doctrine of Lord Coke, that, "a recital doth not conclude, because it is no direct affirmation," (e) has been expressly overruled. The law on this subject has been ably expounded by Baron Parke in *Carpenter v. Buller* (f). "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke Littleton, 352 b; and a recital in instruments not under seal may be such as to be conclusive to the same

(c) The principal cases are:—In Massachusetts, *Wilkinson v. Scott*, 17 Mass. 249; *Clapp v. Tirrell*, 20 Pick. 247;—in Maine, *Schilenger v. McCann*, 6 Greenl. 364; *Tyler v. Carleton*, 7 Greenl. 175; *Emmons v. Littlefield*, 1 Shepl. 233; *Burbank v. Gould*, 3 Shepl. 118;—in New Hampshire, *Morse v. Shattuck*, 4 New Hamp. 229; *Pritchard v. Brown*, ib. 397;—in Connecticut, *Belden v. Seymour*, 8 Conn. 304;—in New York, *Shepherd v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 Johns. 388; *Whitbeck v. Whitbeck*, 9 Cowen, 266; *McCrea v. Purmort*, 16 Wend. 460;—in Pennsylvania, *Weigley v. Weir*, 7 Serg. & Raw. 311; *Watson v. Blaine*, 12 Serg. & Raw. 131; *Jack v. Dougherty*, 3 Watts, 151;—in Maryland, *Higdon v. Thomas*, 1 Har. & Gill, 139; *Lingan v. Henderson*, 1 Bland. Ch. 236, 249;—in Virginia, *Duval v. Bibb*, 4 Hen. & Munf. 113; *Harvey v. Alexander*, 1 Randolph, 219;—in South Carolina, *Curry v. Lyles*, 2 Hill, 404; *Garret v. Stuart*, 1 McCord, 514;—in Alabama, *Mead v. Steger*, 5 Porter, 498, 507;—in Tennessee, *Jones v. Ward*, 10 Yerger, 160, 166;—in Kentucky, *Hutchinson v. Sinclair*, 7 Monroe, 291, 293; *Gully v. Grubbs*, 1 J. J. Marsh. 389. The courts in North Carolina seem still to hold the recital of payment as conclusive. *Brocket v. Foscue*, 1 Hawks, 64; *Spiera v. Clay*, 4 Hawks, 22; *Jones v. Sasser*, 1 Dever. & Batt. 452. And in Louisiana it is made so by legislative enactment. Civil Code of Louisiana, Art. 2234; *Forrest v. Shores*, 11 Louis. 416. The earlier cases, to the contrary, together with a farther examination of this subject may be found in Cowen's notes to 1 Phil. Evid. p. 108, n. 194, and p. 549, n. 964. See also *Steele v. Worthington*, 2 Ohio, R. 350.

(d) As to the recital of a lease for a year in a deed of release, see § 59, *ante*, and 4 & 5 Vict. c. 21, § 2.

(e) Co. Lit. 352 b.

(f) 8 M. & Wels. 212. As to other cases where a recital has been held conclusive, see *Bowman v. Taylor*, 2 A. & E. 278; *Lainson v. Tremere*, 1 A. & E. 792; 3 N. & Man. 603, S. C.; *R. v. Stamper*, 1 Q. B. 123; *Hill v. Manchester and Salford Waterworks Co.* 2 B. & Ad. 544; *Pargeter v. Harris*, 7 Q. B. 708.

extent. A strong instance as to a recital in a deed, is found in the case of *Lainson v. Tremere* (g), where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of 170*l.*, and the defendant was estopped from pleading that it was 140*l.* only, and that such amount had been paid. So, where other *particular facts* are mentioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond (i). All the instances given in Com. Dig., Estoppel, (A. 2), under the head of "Estoppel by Matter of Writing," (except one which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of 170*l.* in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less would matter alleged in the instrument, wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other proceeding between them."

§ 79. From this passage it would appear that, to make a recital operate as an estoppel, there must be, first, a distinct statement of some material (k), particular (l) fact; secondly, a contract made

(g) 1 A. & E. 792; 3 Nev. & M. 603, S.C. (i) 1 Roll. Abr. 873, c. 25.

(k) In *Carpenter v. Buller*, 8 M. & Wels. 213, the court were strongly inclined to think that, in a deed relating to an adit, a recital that certain neighbouring lands, through which the adit did not pass, belonged to A. B., was an immaterial matter, which a party to the deed was not estopped from denying. The point, however, was not directly decided, as the admission was held inconclusive on other grounds.

(l) As to the distinction between generality and particularity, see Com. Dig. Estoppel, A. 2, and notes to *Rainsford v. Smith*, 196 a.

with reference to such statement; and, thirdly, an action founded on the instrument containing the recital. In the event of these requisites being satisfied, it would further seem, that the doctrine may, in some cases, be extended to instruments not under seal. In all cases of estoppel by recital, the matter recited requires no proof; since the recital is not offered as secondary, but as primary evidence, which cannot be controverted, and which forms a muniment of title. This rule, however, only applies to so much of a deed as is *actually recited*; and therefore if it becomes necessary to rely on any other part of such deed, it must be produced and proved in the regular way (*m*).

§ 80. Returning from the limited question of recitals to the general doctrine of estoppels, it is important to bear in mind this rule: that every estoppel must be *reciprocal*; that is, it must bind both parties, since a stranger can neither take advantage of an estoppel, nor be bound by it (*n*). Thus, where a party, possessed of chambers in Lincoln's Inn, which he held as tenant-at-will under the benchers, recited in a deed, by which he conveyed his interest to A, that he was seised of these chambers for life, and subsequently surrendered them to the benchers, who admitted B as tenant, the court held that B, in defending an action of ejectment brought against him by A, was not estopped from denying that the surrenderor was seised for life (*o*). So, where a tenant took certain lands from the assignees of a bankrupt, by a deed in which they were described as freehold, he was held not estopped, as against the bankrupt's wife, who claimed dower, from proving that they were in fact leasehold (*p*). Again, the grantee, or lessee of a deed-poll, is not, in general, estopped from gainsaying anything mentioned in the deed; for it is the deed of the grantor or lessor only; yet if such grantee or lessee claim title under the deed, he is thereby estopped to deny the title of the grantor (*r*). An exception to this rule requiring reciprocity in estoppels would

(*m*) *Gillett v. Abbott*, 7 A. & E. 783; 3 N. & P. 24, S.C.

(*n*) Co. Lit. 352 *a*.

(*o*) *Doe v. Errington*, 6 Bing. N.C. 79.

(*p*) *Gaunt v. Wainman*, 3 Bing. N.C. 69.

(*r*) Co. Lit. 363 *b*; *Goddard's case*, 4 Co. 44.

perhaps, be recognised in the case of deed-polls, because in these instruments, only one party is intended to be bound, and as he has executed a deed with the same solemnities as an indenture, there appears to be no valid reason why the doctrine of estoppel should not apply to him (*t*).

§ 81. A further rule with respect to estoppels by deed is this, that a deed which can take effect *by interest* shall not be construed to take effect by estoppel (*u*). Thus, if a lessor has any interest in the demised premises, even though it be for a less period than he professes to grant, the lease shall not work by estoppel, but shall enure to the extent of the lessor's interest and no further (*x*). But if a person, having no title whatever, makes a lease by indenture, this will estop the parties to the deed from alleging the lessor's want of title during the continuance of the lease; and if the lessor subsequently purchases the land, or otherwise obtains an interest in it, the lease which was originally a lease by *estoppel*, will be converted into a lease *in interest*, and the heir or assignee of the lessor will be bound thereby, as well as the lessee and his assignees (*y*).

§ 82. The most ordinary instance of estoppel by *matter in pais*, is the well-established rule, that a tenant, during his possession of premises, shall not deny that the landlord, under whom he has entered, or from whom he has taken a renewal of his holding (*z*), and to whom he has paid rent, had title at the time of his admission (*a*). Thus, whether the landlord brings ejectment, or an action for use and occupation, against his tenant, the defendant can neither set up the superior title of a third person (*b*), nor show that the landlord has no title; as for instance, if the plaintiff be an incumbent, by giving

(*t*) 2 Smith's Lead. C. 438; Bac. Ab. tit. Leases, *O*.

(*u*) Doe v. Barton, 11 A. & E. 311, per Patteson, J.

(*x*) *Id.* in argument; Co. Lit. 45 *a*, 47 *b*; Doe v. Seaton, 2 C. M. & R. 730, per Parke, B.; Walton v. Waterhouse, 3 Wms. Saund. 417 *a*, *et seq.*

(*y*) Webb v. Austin, 7 M. & Gr. 701; Sturgeon v. Wingfield, 15 M. & W. 224.

(*z*) Doe v. Wiggins, 4 Q. B. 367.

(*a*) Doe v. Pegge, 1 T. R. 760 n., per Lord Mansfield; Doe v. Barton, 11 A. & E. 307, 312; 3 P. & D. 194, S.C.

(*b*) Doe v. Pegge, 1 T. R. 760 n., per Lord Mansfield.

evidence of a simoniacal presentation (c), or, if he be a devisee, by proving that the devisor was incapable of making a will (d). In this last case, indeed, the evidence might be admissible as part of the tenant's case, if he could show that the party claiming as devisee had been guilty of fraud in making the will, and in falsely representing it to him as a valid one (e); but, excepting in the instance of a clear case of fraud being established, the only course which a tenant can pursue, who wishes to dispute the title of the landlord under whom he entered, is to yield up the premises, and then bring ejectment (f). So strict is this rule, that, even should a landlord, while proving his own case, in an action against the tenant for use and occupation, disclose the fact that he himself had only an equitable or a joint estate in the premises, the tenant cannot avail himself of that circumstance as a defence to the action (g). And where a tenant has held premises under a corporation aggregate, and paid rent, he cannot object to their suing him for use and occupation, on the ground that a corporation cannot demise except by deed, and that he has occupied without deed (h). This rule, too, is binding, not only on the tenant himself, but on all who claim in any way through him. Thus, where a lessee gave up possession of the premises to a party claiming them by a title adverse to that of the lessor, and prior to the lease, that party was held to be estopped, as the lessee would have been, from disputing the landlord's title (i). The principle of this rule extends also to the case of a person coming in by permission as a mere lodger, a servant, or other licensee (k).

(c) *Cooke v. Loxley*, 5 T. R. 4. (d) *Doe v. Wiggins*, 4 Q. B. 367.

(e) Per Lord Denman in *Doe v. Wiggins*, 4 Q. B. 375.

(f) Per Coleridge, J., in *id.* 377; *Doe v. Lady Smythe*, 4 M. & Sel. 348.

(g) *Dolby v. Iles*, 11 A. & E. 335.

(h) *Mayor of Stafford v. Till*, 4 Bing. 75; 12 B. Moore, 260, S.C.; *Dean & Ch. of Rochester v. Pierce*, 1 Camp. 466; recognised in *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 194.

(i) *Doe v. Mills*, 2 A. & E. 17; *Doe v. Lady Smythe*, 4 M. & S. 347; *Taylor v. Needham*, 2 Taunt. 278.

(k) *Doe v. Baytup*, 3 A. & E. 188. In this case a woman asked leave to get vegetables in the garden, and having obtained the keys for this purpose, fraudulently took possession of the house and set up a title. The court held that she could not defend an ejectment, but must deliver up the premises before she contested the title. See also *Doe v. Birchmore*, 9 A. & E. 662.

§ 83. But though a tenant cannot deny that the person by whom he was let into possession had title at the commencement of the tenancy, he may show, either that he had no title at a previous time (*l*), or that the title has since expired or been defeated (*m*). Thus he may prove that his landlord was a tenant *pur auter vie*, and that the *cestui que vie* is dead; or that he was a tenant from year to year, and that the superior landlord had given him a notice to quit, or that he was a mere tenant at will, and that the will had been determined (*o*). So, also, the tenant may show, that the person who let him in was a mortgagor in possession, who, not being treated as a trespasser, had title to confer on him the legal possession; and may then further prove that this party has subsequently been treated as a trespasser, whereby both the mortgagor's title, as well as his own rightful possession under him, have been determined (*p*). In short, he may rely on any fact, which either amounts to an eviction by title paramount (*q*), or shows that the title of his landlord has expired (*r*).

§ 84. As to what constitutes a letting into possession, some doubt exists. In one case, where a party was in possession of premises without leave obtained from any one, and a person came

(*l*) *Doe v. Powell*, 1 A. & E. 531. In that case, defendant claimed under a conveyance from a certain company bearing date 1824, and the court allowed him to dispute the title of the company to convey the same premises to the lessor of the plaintiff in 1818.

(*m*) *Doe v. Barton*, 11 A. & E. 312, per Lord Denman; *Hopcraft v. Keys*, 9 Bing. 613.

(*o*) *Doe v. Barton*, 11 A. & E. 314.

(*p*) *Id.* p. 315. Whether the mortgagee, by giving notice to the tenant to pay rent to him, treats the mortgagor as a trespasser, is a point on which considerable doubt has been felt, *id.*

(*q*) *Gouldsworth v. Knights*, 11 M. & W. 344.

(*r*) *Downs v. Cooper*, 2 Q. B. 256. In that case, A. demised premises to B., and during the term C. claimed the property. The matter was referred, and the arbitrator awarded in C.'s favour. A. thereupon delivered up the title deeds to C., and permitted him to tell B. to pay the rent in future to him C. B. did so, but A. afterwards distrained for the same rent. On replevin, avowry, and plea in bar stating the above facts, held that A.'s title had expired; that his conduct was an admission of that fact, and that B. was not estopped from alleging it; and per Lord Denman, that A., having induced B. to pay rent to C., was estopped from setting up his relation of landlord against B. See also *Doe v. Watson*, 2 Stark. R. 230; *Claridge v. Mackenzie*, 4 M. & Gr. 152; overruling *Balls v. Westwood*, 2 Camp. 11; *Doe v. Seaton*, 2 C. M. & R. 728.

to him and said, "You have no right to the premises," upon which he acquiesced, and took a lease from this person, the court held that the relation of landlord and tenant was sufficiently created to debar the one from disputing the title of the other (s). But in a subsequent case, where a tenant, being already in possession of premises under a demise from a termor, had, at the expiration of the termor's right, when his own title also expired, entered into a parol agreement with another party, to hold the premises under him; but it appeared that he had done so in ignorance of the real facts of the case, and under the supposition that this party was entitled to the premises; it was held that the agreement was not equivalent to a first letting into possession (t). This question may, in certain cases, become highly important, because neither a parol agreement by a tenant to hold premises of a party, by whom he was *not let into possession* (u), nor an attornment (x), nor an actual payment of rent to such party, will in themselves operate as estoppels; but the tenant may still show that he has acted in ignorance, or under a misapprehension of the real circumstances (y), or, in the case of payment of rent, that some other party was entitled to receive it (z).

(s) *Doe v. Mills*, 2 A. & E. 20, per Patteson, J. See also *Dolby v. Iles*, 11 A. & E. 335.

(t) *Claridge v. Mackenzie*, 4 M. & Gr. 143; 4 Scott, N. R. 796, S.C. "The witness speaks of a new agreement having been entered into between the plaintiff and the defendant, that the former should continue in possession as tenant to the latter; but there was no *new* possession given by the defendant; she was in no way prejudiced; she could not have turned the plaintiff out of possession; and before their agreement, if she had brought her ejectment, the plaintiff might have shown that she had no title, and that the title was in some one else. It is not like the case of a person letting another into possession of vacant premises; it is in fact a remaining in possession of premises, which had been formerly occupied by the tenant." Per Tindal, C. J., 4 M. & Gr. 152.

(u) *Id.*

(x) *Doe v. Brown*, 7 A. & E. 447.

(y) *Gregory v. Doidge*, 3 Bing. 474; 11 B. Moore, 394, S.C.; *Gravenor v. Woodhouse*, 1 Bing. 38; 7 B. Moore, 289, S.C.; *Rogers v. Pitcher*, 6 Taunt. 202; 1 Marsh. 541, S.C.; *Doe v. Barton*, 11 A. & E. 313; 3 P. & D. 194, S.C.; *Hall v. Butler*, 10 A. & E. 206, per Patteson, J.

(z) *Cooper v. Blandy*, 1 Bing. N. C. 49, 50; *Doe v. Francis*, 2 M. & Rob. 57; in which case payment of rent being the only evidence of tenancy, Patteson, J., allowed the defendant to show, that the lessor of the plaintiff had acted as the agent of third parties.

§ 85. In addition to the instances of estoppels already given, there are two classes of *admissions*, which are sometimes arranged under this head, namely, *admissions in judicio*, which have been solemnly made in the course of judicial proceedings, either expressly, and as a substitute for proof of the fact, or tacitly by pleading; and *admissions extra judicium*, which have been *acted upon*, or have been made, either to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith. This subject will hereafter be considered under the more appropriate title of Admissions.

§ 86. Conclusive presumptions of law are also made with respect to *infants*. Thus, an infant under the age of seven years is conclusively presumed to be incapable of committing any felony for want of discretion (*a*); and under fourteen, a male infant is presumed incapable, on the ground of impotency, of committing a rape as a principal in the first degree (*b*), or even of committing an assault with intent to perpetrate that crime (*c*). So, a female under the age of ten years is presumed incapable of consenting to sexual intercourse (*d*). An infant under the age of twenty-one years is presumed to be so far incapable of managing his own affairs, that he cannot in general aliene his land, or execute a deed, or bind himself by any contract unless it be for necessities (*e*); neither, since the first of January, 1838, has he had any power to make a will, whether it purport to dispose of real or

(a) 4 Bl. Com. 23; 1 Hale 27.

(b) 1 Hale 630; 1 Russ. C. & M. 676. This presumption is not affected by the act of 9 Geo. 4, c. 31, §§ 16 & 17; *R. v. Groombridge*, 7 C. & P. 582, per Gaselee, J., and Lord Abinger; and it applies to the offence of carnally abusing a girl under 10 years of age; *R. v. Jordan*, 9 C. & P. 118, per Williams, J. But if the boy have a mischievous discretion, he may be a principal in the second degree, 1 Hale, 630; and if indicted for a rape, he may be convicted of an assault under 1 Vict. c. 85, § 11; *R. v. Brimilow*, 2 Moo. C. C. 122; 9 C. & P. 368, S.C.

(c) *R. v. Eldershaw*, 3 C. & P. 396, per Vaughan, B.; *R. v. Philips*, 8 C. & P. 736, per Patteson, J.

(d) 1 Russ. C. & M. 693, 694; 9 Geo. 4, c. 31, § 17. Between the ages of ten and twelve the consent of the girl only reduces the man's crime from felony to misdemeanour, *id.*

(e) 1 Bl. Com. 465, 466; Co. Lit. 78 b.

personal estate (*f*); though, before that date, boys of fourteen years, and girls of twelve, might have disposed of personalty by will, provided they were proved to have been of sufficient discretion (*g*).

§ 87. Again, the law in certain cases recognises a conclusive presumption in favour of *legitimacy*. Thus, where the husband and wife have cohabited together and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is shown to have been, at the same time, guilty of infidelity (*h*); and even where the parents are living separate, a strong presumption of legitimacy still arises, which can only be rebutted, either by proving a divorce *a mensâ et thoro*, or by cogent and almost irresistible proof of non-access (*i*). The fact that a woman is living in notorious adultery is not, in itself, sufficient to repel this presumption (*j*). But where the parents are divorced *a mensâ et thoro*, their children born during the separation, are, *primâ facie*, illegitimate (*k*).

§ 88. Conclusive presumptions are not unknown to the *law of nations*. Thus, if a neutral vessel be found carrying despatches of the enemy between different parts of the enemy's dominions, their effect is presumed to be hostile (*l*), at least if they have been fraudulently concealed. The *spoliation of papers* by the captured party, has been regarded, in all the states of Continental Europe, as conclusive proof of guilt; but in England and America it is open to explanation, unless the cause labours under heavy suspicions, or there is a vehement presumption of bad faith or gross prevarication (*m*). Still, though the lenity of our code does not found an absolute presumption *juris et de jure*, it only

(*f*) 7 Will. 4 & 1 Vict. c. 26, §§ 7, 34. (g) 1 Will. on Ex. 13, 14.

(*h*) *Cope v. Cope*, 1 M. & Rob. 269, 276; 5 C. & P. 604, S.C.; *Morris v. Davies*, 3 C. & P. 215, 427; 5 Cl. & Fin. 163, S.C.; *Banbury Peerage case*, in Appendix n. (E) to *Le Marchant's Gardner's Peerage case*; 2 Selw. N. P. 759, 760, & 1 Sim. & St. 153, S.C.; *R. v. Luffe*, 8 East, 193. (i) *Id.*

(*j*) *R. v. Mansfield*, 1 Q. B. 444, 450, 451; 1 Gale & Dav. 7, S.C. In this case Lord Denman questions the case of *Cope v. Cope*, as reported in 5 C. & P. 604.

(*k*) *St. George v. St. Margaret*, 1 Salk. 123.

(*l*) *The Atalanta*, 6 Rob. Adm. 440, 454.

(*m*) *The Pizarro*, 2 Wheat. 227, 241, 242, n. c; *The Hunter*, 1 Dods. Adm. 480. See post, § 94.

stops short of that, for it certainly generates a most unfavourable presumption. A case that escapes with such a brand upon it, is only saved, as it were, from the fire (*n*).

§ 89. In these cases of conclusive presumption, the rule of law merely attaches itself to the circumstances when proved ; it is not deduced from them. It is not a rule of inference from testimony, but a rule of protection, as expedient, and for the general good. It does not, for example, assume that all landlords have good titles ; but that it will be a public and general inconvenience to suffer tenants to dispute them. Neither does it assume that all averments and recitals in deeds and records are true ; but that it will be mischievous if parties are permitted to deny them. It does not assume that all simple contract debts, of six years' standing, are paid, nor that every man quietly occupying land twenty years as his own, has a valid title by grant ; but it deems it expedient that claims opposed by such evidence as the lapse of those periods affords, should not be countenanced ; and that society is more benefited by a refusal to entertain such claims, than by suffering them to be made good by proof. In fine, it does not assume the impossibility of things which are possible ; on the contrary it is founded, not only on the possibility of their existence, but on their occasional occurrence ; and it is against the mischiefs of their occurrence that it interposes its protecting prohibition (*o*).

§ 90. The *second* class of presumptions of law, answering to the *præsumptiones juris* of the Roman law, which may always be overcome by opposing proof (*p*), consists of those termed *disputable presumptions*. These, as well as the former, are the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion, or the effect, of the other. The connection, however, in this class is not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected ; but yet it is so general and so nearly universal, that the law itself, without the

(*n*) The Hunter, 1 Dods. Adm. 486, 487, per Sir Wm. Scott.

(*o*) See 6 Law Mag. 348, 355, 356. (*p*) Heinnecc. ad Pand. Pars iv. § 124.

aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode *the law* defines the nature and amount of the evidence, which it deems sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. A contrary verdict would be liable to be set aside as being against evidence.

§ 91. The rules in this class of presumptions, as in the former, have been adopted by common consent, from motives of public policy, and for the promotion of the general good; yet not, as in the former class, forbidding all further evidence, but only excusing or dispensing with it till some proof is given on the other side to rebut the presumption so raised. Thus, as men do not generally violate the penal code, the law presumes every man *innocent*; but some men do transgress it; and therefore evidence is received to repel this presumption. No evidence, however, will be sufficient for this purpose, unless it be distinct and positive, so as to prove the criminality of the accused beyond all reasonable doubt; for the presumption of innocence is so strong, that even where the guilt can be established only by proving a negative, that negative must, in most cases, be proved by the party alleging the guilt, though the general rule of law devolves the burden of proof on the party holding the affirmative. Thus, where the plaintiff complained that the defendant, who had chartered his ship, had put on board an article highly inflammable and dangerous, *without giving notice* of its nature to the master or others in charge of the ship, whereby the vessel was burnt, he was held bound to prove this negative averment (g).

§ 92. Questions of nicety occasionally arise where the presump-

(g) *Williams v. E. Ind. Co.*, 3 East, 193; B. N. P. 298. So of allegations that a party had not taken the Sacrament, *R. v. Hawkins*, 10 East, 211; *affd.* in Dom. Proc. 2 Dow, 124; or had not complied with the act of uniformity, &c., *Powell v. Milburn*, 3 Wils. 355, 366; or that goods were not legally imported, *Sissons v. Dixon*, 5 B. & C. 758; or that a theatre was not duly licensed, *Rodwell v. Redge*, 1 C. & P. 220.

tion of innocence is met by some counter-presumption. Thus, where a woman, twelve months after her husband (a soldier on foreign service) was last heard of, married a second husband, by whom she had children, it was held that the Sessions, upon a question respecting the settlement of these children, were justified in presuming that the first husband was dead at the time of the second marriage, though had it not been for the presumption of innocence, *that* of the continuance of life would have prevailed (*r*). In another case where the point in issue was the derivative settlement of a man's second wife, and a letter was proved to have been written by the first wife from Van Diemen's Land, bearing date only twenty-five days prior to the second marriage, the court confirmed the order of Sessions, which rested on the presumption that the husband had been guilty of bigamy (*s*).

§ 93. An exception to this rule, respecting the presumption of innocence, is admitted in some cases of agency; the principle of law being, both in criminal and civil cases, that a person is liable for what is done under his presumed authority. Thus, on an indictment against a contract baker for selling unwholesome bread, where it appeared that the defendant allowed his foreman to use alum, though not in such quantities as to render the bread unwholesome, Lord Ellenborough held that he might legally be convicted, on proof that the servant had introduced alum into the bread to a deleterious extent (*t*). So, the directors of a gas company were held criminally answerable, on an indictment for a nuisance, for an act done by their superintendent and engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no means to suppose was discontinued (*u*). In like manner, where a libel is sold in a bookseller's

(*r*) *R. v. Twynning*, 2 B. & A. 385. As to the presumption of life, see §§ 124—128, *post*.

(*s*) *R. v. Harborne*, 2 A. & E. 540; *R. v. Mansfield*, 1 Q. B. 449.

(*t*) *R. v. Dixon*, 4 Camp. 12; 3 M. & S. 11, S. C. See *Att.-Gen. v. Riddle*, 2 C. & J. 493; 2 Tyr. 523, S. C.

(*u*) *R. v. Medley*, 6 C. & P. 292. Lord Denman, in summing up, is reported

shop, by his servant, in the ordinary course of his employment, this is evidence of a guilty publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. This exception is founded upon public policy, lest irresponsible persons should be put forward, and the principal and real offender should escape. But such evidence is not conclusive against the master, who may still prove, under the plea of not guilty, that the publication was, in fact, made "without his authority, consent, or knowledge," and that there was "no want of care or caution on his part" (u). The same law is applied to the publishers of newspapers (v).

§ 94. The presumption of innocence may be overthrown, and a *presumption of guilt* be raised, by the misconduct of the party in suppressing or *destroying evidence*, which he ought to produce, or to which the other party is entitled (w). Thus, the spoliation of papers, material to show the neutral character of a vessel, furnishes a strong presumption, *in odium spoliatoris*, against the ship's neutrality (x). So, if any person on board a vessel which is being chased by an officer of the preventive service, shall throw

to have used these words:—"It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided you think that they gave authority to the superintendent to conduct the works, they will be answerable. It seems to me both common sense and law, that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants," 299. This case certainly carries the doctrine to its furthest extent.

(u) 6 & 7 Vict., c. 96, § 7. As to the law before the statute, see 1 Russ. Cr. & M. 251; R. v. Gutch, M. & M. 433; Harding v. Greening, 8 Taunt. 42; R. v. Almon, 5 Burr. 2686.

(v) 1 Russ. C. & M. 251; R. v. Walter, 3 Esp. 21; 6 & 7 Vict., c. 96, § 7; Southwick v. Stevens, 10 Johns. 443.

(w) A remarkable instance of such presumption of guilt was formerly furnished by the act of 21 Jac. 1, c. 27; according to which statute, if the mother of an illegitimate child endeavoured privately, either by drowning, or secret burying, or by any other way, to conceal its death, she was presumed to have murdered it, unless she could prove, by one witness at the least, that the child was born dead. This act was probably copied from a similar edict of Hen. 2, of France, cited by Domat. But this unreasonable and barbarous rule is now rescinded both in England and America. See as to the present English law, stat. 9 Geo. 4, c. 31, § 14.

(x) The Hunter, 1 Dods. 480; The Pizarro, 2 Wheat. 227; 1 Kent, Comm. 167; ante, § 88.

overboard, stave, or destroy any part of the lading, the vessel shall be forfeited, because the conduct of such person raises an almost irresistible presumption, that the freight so made away with was legally liable to seizure (y). So, the concealment on board a vessel of any goods, which are liable to duty, justifies the inference that the owner intended to defraud the customs, and the goods will consequently be forfeited (z). A similar presumption is raised against a party, who, having obtained possession of papers from a witness, after the service of a *subpœna duces tecum* upon the latter for their production, withholds them at the trial (a). The general rule is, *omnia præsumuntur contra spoliatorem* (b). His conduct is attributed to his supposed knowledge that the truth would have operated against him. Thus, also, where the finder of a lost jewel would not produce it, it was presumed, against him, that it was of the highest value of its kind (c). But if the defendant has been guilty of no fraud, or improper conduct, and the only evidence against him is of the delivery to him of the plaintiff's goods, of unknown quality, the presumption is, that they were goods of the cheapest quality (d).

§ 95. The mere *fabrication of evidence*, does not furnish of itself any presumption of law against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts; of which several instances are stated in the books (e). Neither has the mere nonproduction of deeds or papers, upon notice, any other legal effect, than to admit the other party

(y) See 8 & 9 Vict., c. 87, §§ 5 & 6.

(z) See 8 & 9 Vict., c. 87, § 29.

(a) Leeds v. Cook, 4 Esp. 256.

(b) 2 Poth. Obl. (by Evans,) 292; Dalston v. Coatsworth, 1 P. Wms. 731; Cowper v. Earl Cowper, 2 P. Wms. 720, 748—752; R. v. Arundel, Hob. 109, explained in 2 P. Wms. 748, 749; D. of Newcastle v. Kinderley, 8 Ves. 363, 375; Annealey v. E. of Anglesea, 17 How. St. Tr. 1430. See also Sir Samuel Romilly's argument in Lord Melville's case, 29 How. St. Tr. 1194, 1195; Anon. 1 Lord Raym, 731. In Baker v. Ray, 2 Russ. 73, the Lord Chancellor thought that this rule had in some cases been pressed a little too far. See also Harwood v. Goodright, Cowp. 86.

(c) Armory v. Delamorie, 1 Stra. 505.

(d) Clunnes v. Pezzey, 1 Camp. 8.

(e) See 3 Inst. 232; Wills Cir. Ev. 113.

to prove their contents by parol (*f*), and, as against the party refusing to produce them, to raise a *prima facie* presumption, that they have been properly stamped (*g*). It cannot, however, be denied, but that such conduct, if unexplained, is calculated to produce in the minds of the jury a very prejudicial effect against any person having recourse to it (*h*).

§ 96. Though the general presumption of law is, as we have seen, in favour of innocence, yet, as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been wrongfully intended, till the contrary appears (*i*). Thus, on a charge of murder, malice is presumed from the fact of killing, unaccompanied by circumstances of extenuation; and the burden of disproving the malice is thrown upon the accused (*j*). So, if an unauthorised party, with the view of raising money, puts the name of another person to a bill, a felonious intent will be presumed, unless the accused had reasonable grounds for believing that he was authorised to act as he had done, and, in fact, acted on that belief (*k*). The same presumption arises in civil actions, where the act complained of is unlawful. Thus, in actions of slander, though it should appear that the defendant was not actuated by ill-will against the plaintiff, malice *in law* will be inferred from the fact of intentional publication, unless the defendant can show that his language was excusable as a privileged communication, in which case the plaintiff must establish *actual* malice (*l*). This distinction rests upon the ground

(*f*) *Cooper v. Gibbons*, 3 Camp. 363.

(*g*) *Crisp v. Anderson*, 1 Stark. R. 36. See § 103, post.

(*h*) See *Roe v. Harvey*, 4 Burr. 2484, per Lord Mansfield; *Bate v. Kinsey*, 1 C. M. & R. 41, per Lord Lyndhurst.

(*i*) Lord Mansfield has, in clear language, pointed out the distinction between those cases, where a criminal intent must be *proved*, and those, where it will be *presumed*:—"Where an act in itself *indifferent*, if done with a particular intent becomes criminal, there the intent must be proved and found; but where the act is in itself *unlawful*, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." *R. v. Woodfall*, 5 Burr. 2667. See also *R. v. Harvey*, 2 B. & C. 257. (*j*) *Foster*, C. L. 255.

(*k*) *R. v. Beard*, 8 C. & P. 143, 148, 149, per Coleridge, J.

(*l*) *Toogood v. Spyring*, 1 C. M. & R. 181, 193; 4 Tyr. 582, S. C.; *Coxhead v. Richards*, 2 Com. B. 569; *Bromage v. Prosser*, 4 B. & C. 247.

that, when words are proved to have been spoken on a justifiable occasion, the law raises an antagonist presumption, that the speaker was actuated by proper motives (*m*). So, in other actions on the case, as, for a malicious arrest, a malicious prosecution, and the like, the fact that the defendant has had recourse to legal proceedings, raises a *prima facie* inference in his favour, which the plaintiff is bound to rebut by proving the absence of all reasonable and probable cause, and the presence of an actual malicious intent (*n*).

6 D. & R. 296, S. C. In this last case, which was an action for words spoken of the plaintiffs, in their business and trade of bankers, the law of implied or legal malice, as distinguished from malice in fact, was clearly expounded by Bayley, J., in the following terms:—"Malice, in the common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle, without knowing whose they are: if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. * * If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge, that the defendant spoke them falsely; it is not necessary to state, that they were spoken maliciously. This is so laid down in *Styles*, 392, and was adjudged upon error in *Mercer v. Sparks*, Owen, 51; *Noy*, 35. The objection there was, that the words were not charged to have been spoken maliciously, but the court answered, that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander, as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmonson v. Stevenson*, B. N. P. 8, Lord Mansfield takes the distinction between these and ordinary actions of slander." In an action for an alleged libel, contained in an answer to inquiries respecting the character of a servant, the jury may find express malice from the simple fact, that the answer complained of was untrue to the defendant's knowledge; *Fountain v. Boodle*, 3 Q. B. 5.

(*m*) Note (*b*) to *Hodgson v. Scarlett*, 1 B. & A. 245, 246; approved of by *Alderson*, B. in *Gibbs v. Pike*, 9 M. & W. 358.

(*n*) *Mitchell v. Jenkins*, 5 B. & Ad. 588; *Porter v. Weston*, 5 Bing. N. C. 715; *Johnstone v. Sutton*, 1 T. R. 545. The jury *may*, but are not *bound* to infer malice in fact from the want of probable cause. *Id.*

§ 97. Again, as men generally own the property they possess, proof of *possession* is presumptive proof of *ownership* (*o*). This presumption is recognised in most of the statutes, which authorise the compulsory sale of lands for particular purposes ; as, for instance, in the Lands Clauses Consolidation Act (*p*), and in the act relating to lunatic asylums (*q*). At common law, too, it may be illustrated by a great variety of cases. Thus, in an action on a policy of insurance effected on a ship and her cargo, the plaintiff may rely on the mere fact of possession, without the aid of any documentary proof or title deeds, unless such further proof be rendered necessary by the opposite party adducing some contrary evidence (*r*). This rule applies both to real and personal property, and, in the former case, raises a presumption of a seisin in fee (*s*). In some cases, as in actions of trespass to real property, the presumption arising from the simple fact of possession amounts, as against a mere wrong doer, to *conclusive* evidence (*t*). So also, in actions against wrong-doers for injuries to *personal* chattels, proof of possession, coupled with evidence that the plaintiff has some special property in such chattels, constitutes a complete title (*u*). Therefore, an uncertificated bankrupt (*v*), or a bankrupt after a second fiat, who has not paid fifteen shillings in the pound (*w*), may sue in trover a wrong-doer who has taken his goods ; for although the assignees may take possession of his after-acquired property, yet if they allow him to treat such property as his own, no third person can cover his own default by setting up a title, upon which the assignees themselves do not think fit to insist. So, possession of a ship,

(*o*) *Webb v. Fox*, 7 T. R. 397, per Lord Kenyon.

(*p*) 8 & 9 Vict. c. 18, s. 79.

(*q*) 8 & 9 Vict. c. 126, s. 22. See for other instances 9 Geo. 4, c. 40, s. 21 ; 9 Geo. 4, c. 70, s. 14 ; 10 Geo. 4, c. 25, s. 30 ; 10 & 11 Vict. c. 24, s. 28 ; 7 Geo. 4, c. 35, s. 5 ; 3 Geo. 4, c. 126, s. 94.

(*r*) *Robertson v. French*, 4 East, 130, 137 ; *Sutton v. Buck*, 2 Taunt. 302. So, proof that plaintiff has ordered and paid for stores for the ship, is *prima facie* evidence of his ownership, so as to enable him to sustain an action on a policy against the underwriter ; *Thomas v. Foyle*, 5 Esp. 88, per Lord Ellenborough.

(*s*) *Doe v. Coulthred*, 7 A. & E. 239, per Lord Denman ; *Jayne v. Price*, 5 Taunt. 326.

(*t*) *Elliott v. Kemp*, 7 M. & W. 312, per Parke, B. (*u*) *Id.*

(*v*) *Webb v. Fox*, 7 T. R. 391 ; *Drayton v. Dale*, 2 B. & C. 293 ; 3 D. & R. 534, S. C. (*w*) *Fyson v. Chambers*, 9 M. & W. 460.

under a transfer from the rightful owner, which is void for non-compliance with the register acts, constitutes a sufficient title in the plaintiff to support an action of trover against a stranger, for converting parts of the ship which was wrecked (*w*). So, even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner (*x*). But whether a mere naked possession will entitle a party to maintain trover, even against a wrong-doer, is a question upon which considerable doubt has been entertained, and which yet remains to be judicially determined (*y*).

§ 98. In actions of ejectment, though it is an inflexible rule that the plaintiff must recover by the strength of his own legal title, yet proof of a prior possession, however short, will be *prima facie* evidence of title as against a wrong-doer. Thus, where a party received the key of a room from the lessor of the plaintiff, and held the premises for about a year, when the defendant broke in at night and took forcible possession, Lord Tenterden held that the plaintiff was entitled to recover (*z*). In another case of ejectment, where the lessor of the plaintiff proved that he had formerly held the premises for twenty-three years, and during that time had received and increased the rent, the court held that the defendant could not rebut the presumption of a seisin in fee arising from these unequivocal acts of ownership, by showing that he himself had subsequently been in possession for a period less than twenty years, for presumption being thus met by presumption, the defendant was bound to establish, if he could, a title of a higher description (*a*). In some cases, it will be presumed, that the fee-simple of the land carries with it the right to the minerals; but this presumption is not universal, since in mining districts the right to the minerals and the fee-simple of the soil are frequently in different persons; and it may at all times be rebutted by showing, either an absence

(*w*) *Sutton v. Buck*, 2 Taunt. 302.

(*x*) *Per Chambre, J.*, id. 309.

(*y*) *Fyson v. Chambers*, 9 M. & W. 467, *per Parke, B.*; but see *Armory v. Delamorie*, 1 Stra. 505; 2 Saund. 47 c. & d.; *Sutton v. Buck*, 2 Taunt. 309, *per Lawrence, J.*

(*z*) *Doe v. Dyeball*, 3 C. & P. 610; M. & M. 346, S. C.

(*a*) *Doe v. Cooke*, 7 Bing. 346; 5 M. & P. 181, S. C. See also *Brest v. Lever*, 7 M. & W. 593.

of enjoyment of the minerals by the owner of the soil, or an actual user of the minerals by a stranger (*a*).

§ 99. Possession of the fruits of crime, *recently* after its commission, is *prima facie* evidence of *guilty possession*; and if unexplained, either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is usually regarded by the jury as conclusive (*b*). The question as to what amounts to recent possession, varies according as the stolen article is or is not calculated to pass readily from hand to hand. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after they had been stolen, Mr. Justice Patteson held, that the prisoner should explain how he came by the property (*c*). But, where the only evidence against a prisoner was, that certain tools had been traced to his possession three months after their loss, Mr. Justice Parke directed an acquittal (*d*). So, where goods, lost sixteen months before, were found in the prisoner's house, and there was no other evidence against him, he was not called upon for his defence (*e*). Indeed, the finding of stolen property in the *house* of the accused, provided there were other inmates capable of committing the larceny, would *of itself* be insufficient to prove *his possession*, however recently the theft may have been effected (*f*); though, if coupled with proof of

(*a*) *Rowe v. Grenfel*, R. & Moo. 396, per Lord Tenterden; *Rowe v. Brenton*, 8 B. & C. 737; *Hodgkinson v. Fletcher*, 3 Doug. 31.

(*b*) 2 East, P. C. 656; *R. v. —*, 2 C. & P. 459; *The State v. Adams*, 1 Hayw. 463; *Wills Circums. Ev.* 67. "Furtum præsumitur commissum ab illo, penes quem res furata inventa fuerit, adeo ut si non docuerit à quo rem habuerit, justè, ex illà inventione, poterit subjici tormentis." *Mascard. de Probat.* b. 2, concl. 834; *Menoch. de Præsumpt.* lib. 5, præ. 31.

(*c*) *R. v. Partridge*, 7 C. & P. 551.

(*d*) *R. v. Adams*, 3 C. & P. 600. See *R. v. Cockin*, 2 Lewin's R. 235, where two sacks were found in the prisoner's possession twenty days after they had been missed; and Coleridge, J., left the question to the jury, observing, that "stolen property usually passes through many hands." See the observations of the Reporter on this presumption, *id*.

(*e*) *R. v. —*, 2 C. & P. 459, per Bayley, J.

(*f*) 2 St. Ev. 614, n. g. See *Ex parte Ransley*, 3 D. & R. 572. In that case, the bare finding of smuggled spirits in the defendant's house, during his absence from home, was held insufficient to support a conviction under 11 Geo. 1, c. 30,

other suspicious circumstances, it might fully warrant the prisoner's conviction, even though the property was not found in his house until after his apprehension (*g*). This rule of presumption is not confined to cases of theft, but applies to all crimes, even the most penal. Thus, on an indictment for arson, proof that property, which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption that he was present and concerned in the offence (*h*). The like presumption has been raised in the case of murder, accompanied by robbery (*i*); in the case of burglary (*j*); and in the case of the possession of an unusual quantity of counterfeit money (*k*).

§ 100. One of the most important presumptions known to the common law, is that which is usually embodied in the maxim, "*omnia præsumuntur ritè esse acta*." This presumption, which, in principle, is nearly allied to that of innocence, is, as we have seen (*l*), in some instances conclusive, but in the great majority of cases to which it applies, it is only available, donec probetur in contrarium. The application of this presumption to *acts* of an *official* or *judicial* character will be best illustrated by referring to one or two decisions. On an indictment for perjury in an answer to a bill in Chancery, proof of the signatures of the defendant, and of the Master in Chancery, before whom the answer purported to have been sworn, has been held sufficient evidence that the defendant was regularly sworn to the truth of its contents, though the clerk, who proved the hand-writing of the Master, had no recollection of administering the oath, and admitted that the jurat was not written by himself (*m*). A party being detained for debt in

§ 16, for knowingly harbouring and concealing three gallons of foreign Geneva, &c. Abbott, C. J., observed, "The mere naked fact of the spirits being found in the defendant's house during his absence, cannot be considered as conclusive evidence of knowledge to support a conviction on this statute. There is abundant ground for suspicion, but we cannot say that it is a clear and satisfactory ground to convict." See also, *R. v. Hale*, 2 Cowp. 728.

(*g*) *R. v. Watson*, 2 Stark. R. 139, per Lord Ellenborough and Abbott, J.

(*h*) *R. v. Rickman*, 3 East, P. C. 1035.

(*i*) *Wills Circums. Ev.* 72 *et seq.*

(*j*) See *R. v. Gould*, 9 C. & P. 864.

(*k*) *R. v. Fuller*, R. & R. 308.

(*l*) *Ante*, §§ 68, 69.

(*m*) *R. v. Benson*, 2 Camp. 508, per Lord Ellenborough.

the gaol of the sheriff of Devonshire, a writ of *ca. sa.* at the suit of the sheriff was directed to the coroner of the county, and was lodged with the keeper of the gaol. On motion to discharge this party out of custody for irregularity, it did not appear from the affidavits that the writ was ever in the coroner's hands, but in a return which the gaoler had made to a writ of *habeas corpus* previously issued, the *ca. sa.* was set out, together with a certificate by the coroner, that this was a true copy of the writ. Upon these facts the court gave such credit to the regularity of the proceedings, as to presume that the writ had in due course come to the gaoler through the coroner (*n*). So, where a parish certificate purported to be granted by A, the only churchwarden, and B, the only overseer of the parish, the Court, after a lapse of sixty years, during which time the appellant parish had submitted to the certificate, presumed in its favour that, by custom, there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them was dead, and his vacancy not filled up at the date of the certificate (*o*). A like presumption was made in favour of a parish indenture of apprenticeship, which was signed only by one churchwarden, and one overseer (*p*). So, where the deed of apprenticeship, executed thirty years before, and under which the apprentice had regularly served his time, was proved to be lost, and it further appeared that the parish, in which the pauper was settled under this indenture, had relieved him for the last twelve years, the Court considered that the sessions had acted rightly, in presuming that the deed was properly stamped, though the stamp officers proved that it did not appear in their office, that any such indenture had been stamped during the last thirty-one years (*q*).

(*n*) *Bastard v. Trutch*, 3 A. & E. 451; 5 N. & M. 109; 4 Dowl. 6, S. C.

(*o*) *R. v. Catesby*, 2 B. & C. 814; see also *R. v. Whitchurch*, 7 B. & C. 573. From *R. v. Upton Gray*, 10 B. & C. 807, it appears that this presumption is rather one of *fact* than of *law*; and, indeed, this may be said of several presumptions, which, from motives of convenience, have been treated under the present head. The distinction, however, being one only of degree, is not very material, and is by no means well-defined.

(*p*) *R. v. Hinckley*, 12 East, 361.

(*q*) *R. v. Long Buckby*, 7 East, 45. In this case, as also in that of *R. v. Catesby*, 2 B. & C. 814, the judgment of the court partly rested on the presumption of validity arising from long acquiescence. See ante, § 69.

§ 101. In like manner every reasonable intendment will be made in support of an order of justices, provided it appear on the face of the order that the justices had jurisdiction (*q*); but this rule does not extend to convictions, which combining, as they do, summary power with penal consequences, are watched with peculiar vigilance by the superior courts, and are construed with at least as great strictness as indictments (*r*). Still, even with respect to convictions, if the *authority* of the magistrate can be distinctly collected from the facts stated on the record, the Court will not be *astute* in discovering irregularities in the proceedings, and the safest rule which can be laid down on this subject, is, in the words of Lord Ellenborough, that the Court "*can* intend nothing in favour of convictions, and *will* intend nothing against them" (*s*).

§ 102. Neither does this presumption apply so as, in any event, to *give jurisdiction* to inferior courts, or to magistrates, or others acting under a special statutory power; but in all such cases, every circumstance required by the statute to give jurisdiction *must* appear on the face of the proceedings (*t*). There is no distinction, in this respect, between convictions, commitments, examinations, and orders (*u*); and whether the order be made by the Lord Chancellor, under the special act, or by a justice of the peace, the facts which gave the authority must be stated (*v*). But though the Court of Queen's Bench, in the exercise of their superintending power, will intend nothing in favour of inferior jurisdictions, they will intend nothing against them, but will decide according to the very language employed in the order or other judicial

(*q*) *R. v. Morris*, 4 T. R. 552, per Lord Kenyon.

(*r*) *Id.*; *R. v. Baines*, 2 Lord Raym. 1265, 1269; *Fletcher v. Calthrop*, 6 Q. B. 880, 891; *R. v. Little*, 1 Burr. 613, per Lord Mansfield; *R. v. Corden*, 4 id. 2281, where the Court observed that "a tight hand ought to be holden over these summary convictions"; *R. v. Pain*, 7 D. & R. 678, per Abbott, C. J.; *R. v. Daman*, 2 B. & A. 378.

(*s*) *R. v. Hazell*, 18 East, 141. See Paley on Convic. 74—77.

(*t*) *R. v. All Saints, Southampton*, 7 B. & C. 790, per Holroyd, J.; *R. v. Helling*, 1 Stra. 8, per Pratt, C. J.; *R. v. Hulcott*, 6 T. R. 583.

(*u*) *Day v. King*, 5 A. & E., 359, per Williams, J.; *Brook v. Jenney*, 2 Q. B. 273, per *id.*; *Johnson v. Reid*, 6 M. & W. 124.

(*v*) *Christie v. Unwin*, 11 A. & E. 379, per Coleridge, J.

document (*w*). On motions for a prohibition, the Court of Queen's Bench have more than once emphatically rejected any intendment that the Ecclesiastical Courts would outstep their duty, or act in any way inconsistently with the law (*x*); and on the same principle they have refused to anticipate the decision of the master on a question of costs, as they cannot presume that he will decide erroneously (*y*).

§ 103. This presumption has, in many instances, been recognised in support of the solemn *acts* of even *private* persons, but a reference to a few of the more modern cases, will, it is hoped, be sufficient to illustrate its operation in connection with such acts. Thus, although in the case of contracts not under seal a consideration must in general be averred and proved, yet *bills of exchange* and promissory notes enjoy the privilege of being presumed, *prima facie*, to be founded on a valuable consideration (*z*). The law raises this presumption in favour of these instruments, partly, because it is important to preserve their negotiability intact, and partly, because the existence of a valid consideration may reasonably be inferred, from the solemnity of the instruments themselves, and the deliberate mode in which they are executed (*a*). So, if secondary evidence is admitted to prove the contents of an instrument, which is either lost, or retained by the opposite party after notice to produce it, the Court will presume that the original was duly stamped, unless some evidence to the contrary be given (*b*). So, in the absence of all proof, as to which of two deeds of even date was first executed, the Court will presume in favour of that order of priority, which will best support the clear intent of the parties (*c*). So, in an action of ejectment brought

(*w*) *R. v. Helling*, 1 Stra. 8, per Pratt, C. J.; *Christie v. Unwin*, 11 A. & E. 379, per Coleridge, J.; *In re Clarke*, 2 Q. B. 630, per Lord Denman.

(*x*) *Chesterton v. Farlar*, 7 A. & E. 713; *Hall v. Maule*, id. 721; *Hallack v. U. of Cambridge*, 1 Q. B. 593, 614, 615. (*y*) *Head v. Baldry*, 8 A. & E. 605.

(*z*) *Collins v. Martin*, 1 B. & P. 651; *Holliday v. Atkinson*, 5 B. & C. 501; *Story on Bills of Ex.* §§ 16, 178. See ante, § 68.

(*a*) *Story on Bills of Ex.* §§ 16, 178.

(*b*) *Hart v. Hart*, 1 Hare, 1, per Wigram, V. C.; *Pooley v. Goodwin*, 4 A. & E. 94; *Crisp v. Anderson*, 1 Stark. R. 35; *R. v. Long Buckby*, 7 East, 45.

(*c*) *Taylor v. Horde*, 1 Burr. 107.

upon the assignment of a term by the defendant to secure the payment of an annuity to the lessor of the plaintiff, the Court will presume that the annuity has been duly enrolled (c), and the party relying on the want of the enrolment, must prove the negative: "it is like the case of a proviso in an Act of Parliament, in which it is a settled rule, that the party wishing to avail himself of it, must bring himself within it" (d). But no such presumption will be made in favour of conveyances for charitable uses, even after a long and undisturbed enjoyment (e). The distinction between these cases appears to be, that the Annuity Acts do not prohibit the conveyance of lands to secure the payment of annuities, but the Mortmain Act (f) renders void all gifts of realty to charitable uses, unless by deed indented, executed, and enrolled agreeably to the provisions therein contained.

§ 104. In like manner where the *attestation* of a *deed* has been in the usual form, and the signature of the party has been proved, the jury have more than once been advised to presume a due sealing and delivery, and that in cases where the attesting witness has denied all recollection of any other form been gone through beyond the mere signing (g). Neither is it necessary, in order to constitute a valid sealing, that an impression should be made with wax or with a wafer, but an impression made in ink with a wooden block will suffice (h); and even though no impression appear on the parchment or paper, still, if the instrument be a deed, and on proper stamps, and be stated in the attestation

(c) *Doe v. Mason*, 3 Camp. 7, per Lord Ellenborough, which was a decision on the 17 Geo. 3, c. 26; *Doe v. Bingham*, 4 B. & A. 672, which was on the act of 53 Geo. 3, c. 141. See *London and Brighton Railway Co. v. Fairclough*, 2 M. & Gr. 674.

(d) Per Bayley, J., in *Doe v. Bingham*, 4 B. & A. 676.

(e) *Doe v. Waterton*, 3 B. & A. 149; *Wright v. Smythies*, 10 East, 409.

(f) 9 Geo. 2, c. 36.

(g) *Fasset v. Brown*, Pea. R. 23; *Grellier v. Neale*, id. 146, per Lord Kenyon; *Talbot v. Hodson*, 7 Taunt. 251; *Burling v. Paterson*, 9 C. & P. 570, per Patteson, J.; *Davidson v. Cooper*, 11 M. & W. 784, per Lord Abinger. This presumption, though formerly treated as one of law, is now properly considered as one of fact, and the question is in all cases left to the jury. See n. (o) to § 100, ante.

(h) *R. v. St. Paul Covent Garden*, 7 Q. B. 232.

to have been duly sealed and delivered, it will, in the absence of evidence to the contrary, be presumed to have been sealed (*h*).

§ 105. With respect to the *execution and alteration of wills*, the Ecclesiastical Courts recognise one or two presumptions, which it will be expedient to mention in this place. *First*, it is a general rule in those courts that, on proof of the signature of the deceased, he will be presumed to have known the contents and effect of the instrument he has signed (*i*): but this presumption is liable to be rebutted by showing the existence of any suspicious circumstances; and therefore, if the testator from want of education, or from bodily infirmity, was unable to read (*j*), or if his capacity at the time of executing the instrument is a matter of doubt (*k*); or if the party who is materially benefited by the will, has prepared it, or conducted its execution, or has been in a position calculated to exercise undue influence (*l*); or if the instrument itself is not consonant to the testator's natural affections and moral duties;—a more rigid investigation will be enforced, and probate will, in general, not be granted, unless the Court be satisfied by additional evidence, that the paper propounded does really express the true will of the deceased. In some cases of extraordinary suspicion, it may be highly expedient, if not absolutely necessary, to prove, either that instructions were given by the deceased corresponding with the actual provisions of the will, or that the instrument was, at the time of execution, read to or by the testator, or that he had expressed some subsequent knowledge and approval of its dispositions; but if the suspicious circumstances are not of a grave character, this precise species of evidence is not required,

(*h*) Sugden on Powers, 300, 6th ed., cited by Lord Denman in *R. v. St. Paul Covent Garden*, 7 Q. B. 238.

(*i*) *Billinghurst v. Vickers*, 1 Phill. Ec. R. 191; *Fawcett v. Jones*, 3 Phill. Ec. R. 476; *Wheeler v. Alderson*, 3 Hag. Ec. R. 587.

(*j*) *Barton v. Robins*, 3 Phill. Ec. R. 455, note (*b*); but see *Longchamp v. Fish*, 2 New. R. 415.

(*k*) 1 Phill. Ec. R. 193; *Ingram v. Wyatt*, 1 Hagg. Ec. R. 384; *Dodge v. Meech*, id. 620.

(*l*) *Parke v. Ollat*, 2 Phill. Ec. R. 324; *Zacharias v. Collis*, 3 id. 202; *Wheeler v. Alderson*, 3 Hag. Ec. R. 587; *Billinghurst v. Vickers*, 1 Phill. Ec. R. 187; *Durling v. Loveland*, 2 Curt. Ec. R. 226, 227; *Paine v. Hall*, 18 Ves. 475; *O'Connel v. Butler*, Milw. Eccl. Ir. R. temp. Radcliff, 102, 103.

and it will be sufficient if, by any means of proof, a knowledge of the contents of the will can be brought home to the deceased (*m*).

§ 106. *Secondly*, if a will or codicil, valid according to the Statute of Frauds (*n*), but not executed in the manner prescribed by the New Will Act (*o*), be found without date, and the Court can obtain no information as to the time when it was made, the presumption that it was made before the 1st of January, 1838, when the New Act came into operation, will prevail; for, in the absence of all evidence tending to a contrary conclusion, the Court will presume that the testator knew the law, especially, when by so doing, the validity of the instrument can be sustained (*p*). But it is obvious, that this presumption must gradually diminish in weight, as the interval between the 1st of January, 1838, and the date of the testator's death becomes greater, till, at last, after the lapse of a few years, it will altogether cease.

§ 107. *Thirdly*, if a will, made before the 1st of January, 1838, has an unwitnessed attestation clause, a presumption arises against its validity, which, if the writing purport to dispose of real as well as personal estate, and if both funds are blended together, and are mutually charged with payment of debts and legacies, is almost irresistible (*q*). So, if the document relate merely to personal estate, the presumption against it is so far important, that it *must* be rebutted by *some* extrinsic circumstances (*r*); as, for instance, by proof that the deceased had declared the paper in question to be his last will, had read it as such to some near relative, had written respecting it to a party interested under it, or the like (*s*).

§ 108. *Fourthly*, the Ecclesiastical Courts presume that pencil

(*m*) *Barry v. Butlin*, 1 Curt. Ec. R. 638—641; 2 Moore, P. C. R. 482—485, S.C. See further on this subject 1 Williams on Ex. 78, 262—264.

(*n*) 29 Car. 2, c. 3.

(*o*) 7 Will. 4 & 1 Vict. c. 26.

(*p*) *Pechell v. Jenkinson*, 2 Curt. 273. In that case the testator died in January, 1839.

(*q*) *Douglas v. Smith*, 3 Knapp. P. C. R. 1, 11.

(*r*) *Beaty v. Beaty*, 1 Add. Ec. R. 154, per Sir John Nicholl; *Pett v. Hake*, 3 Curt. Ec. R. 617, per Sir Herbert Fust.

(*s*) *Harris v. Bedford*, 2 Phill. Ec. R. 177, per Sir John Nicholl; *Pett v. Hake*, 3 Curt. Ec. R. 617.

alterations in a will are deliberative (*t*), the presumption being founded on the obvious probability, that the deceased would have resorted to a more durable material, had he wished to express his final intention (*u*). This presumption, which is also partially recognised in the courts of common law and of equity (*w*), is considerably strengthened, if, in the same instrument, there are other alterations in ink (*x*), or if the paper appears to have been originally drawn with care, while the pencil alterations are incomplete and inaccurate (*y*). On the other hand, the presumption may be rebutted, either by showing that the deceased, at the time of executing the will, had no opportunity of using more durable materials (*z*), or, on its appearing, that the pencil alterations were made with care, and were themselves probable under the circumstances; that the death of the testator was not sudden, and that the paper was put away securely with other writings of importance (*a*); or, by proof of other facts of a similar nature, leading to the inference that the alterations in their present form were finally intended to operate as part of the will. Where a paper written in ink, bearing date the 5th of October, 1837, and purporting to dispose of real and personal estate, had an unsigned attestation clause, and was dated and signed in pencil by the deceased, with the following pencil addition attached to the signature: "in case of accident I sign this my will,"—the Privy Council, reversing the decision of the Prerogative Court allowed allegations to be pleaded and proved, that the deceased intended to die testate, and had died suddenly. Their Lordships afterwards held, that proof of these allegations was

(*t*) This presumption is also confined to wills made before the 1st January, 1838, since by sect. 21 of 7 Will. 4 & 1 Vict., c. 26, "no obliteration, interlineation, or other alteration, made in a will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed" as a will.

(*u*) *Edwards v. Astley*, 1 Hag. Ec. R. 493, 494, per Sir John Nicholl; *Par-kin v. Bainbridge*, 3 Phill. Ec. R. 321; *Ravenscroft v. Hunter*, 2 Hag. Eccl. R. 68; *Lavender v. Adams*, 1 Add. 403.

(*w*) *Francis v. Grover*, 5 Hare, 39, 46—49, per Wigram, V. C.

(*x*) *Hawkes v. Hawkes*, 1 Hagg. Ec. R. 321, per Sir John Nicholl.

(*y*) *Edwards v. Astley*, 1 Hagg. Ec. R. 490.

(*z*) *Bymes v. Clarkson*, 1 Phill. Ec. R. 22, 35, per Sir John Nicholl.

(*a*) *Dickenson v. Dickenson*, 2 Phill. Ec. R. 173, per id.

sufficient to rebut the legal presumption against the paper, and probate was finally decreed (*b*).

§ 109. *Fifthly*, in the absence of direct evidence, the law presumes that all alterations or erasures, which may appear on the face of a will, were made after its execution; and consequently, the Ecclesiastical Courts will, in a case of unexplained alteration or erasure, grant probate of the will in its original form (*c*).

§ 110. It may be laid down as a general *prima facie* presumption, that all *documents were made on the day they bear date*. This presumption prevails, whether the document be a modern or ancient deed (*d*), a bill of exchange, or promissory note (*e*), an account (*f*), or even a letter (*g*); and this, too, whether it be written by a party to the suit or not (*h*). This rule is, however, subject to one *exception*; where, in order to prove a petitioning creditor's debt, the assignees put in an instrument signed by the bankrupt, which bears date before the act of bankruptcy. In these cases, as the effect of a proceeding in bankruptcy is retrospective, and its object is to invalidate all transactions which have taken place between the act of bankruptcy and the time when the fiat takes effect; and as, moreover, it is the interest of the petitioning creditor to support the fiat, the Courts have felt a reasonable jealousy of a collusion between him and the bankrupt, and have, accordingly, required that some independent proof of the existence of the instrument, previous to the act of bankruptcy, should be given in evidence, beyond the mere date apparent on its face (*i*).

(*b*) *Bateman v. Pennington*, 3 Moore P. C. R. 223.

(*c*) *Cooper v. Bockett*, 4 Moore, P. C. R. 419.

(*d*) *Anderson v. Weston*, 6 Bing. N. C. 300, 301; *Davies v. Lowndes*, 7 Scott, N. S. 214; 6 M. & Gr. 527, 528, S. C.; *Doe v. Stillwell*, 8 A. & E. 645; *Smith v. Battens*, 1 M. & Rob. 341.

(*e*) *Anderson v. Weston*, 6 Bing. N. C. 296; 8 Scott, 583, S. C.; *Smith v. Battens*, 1 M. & Rob. 341.

(*f*) *Sinclair v. Baggaley*, 4 M. & W. 312.

(*g*) *Hunt v. Massey*, 5 B. & Ad. 902; *Goodtitle v. Milburn*, 2 M. & W. 853.

(*h*) See 6 Bing. N. C. 301, per Bosanquet, J.

(*i*) *Anderson v. Weston*, 6 Bing. N. C. 301, 302, per Bosanquet, J.; *Sinclair v. Baggaley*, 4 M. & W. 318, per Lord Abinger; *Hoare v. Coryton*, 4 Taunt. 560; *Wright v. Lainson*, 2 M. & W. 739, 743. These cases overrule *Taylor v. Kinloch*, 1 Stark. R. 175.

It may be questionable whether the Courts would not *now* recognise a *second exception* to the rule in those cases, where indorsements made by a deceased obligee on a bond, acknowledging the receipt of interest, are tendered in evidence by his assignee, with the view of defeating a plea of the Statute of Limitation, set up by the obligor (*k*).

§ 111. The fact that a person has *acted in an official capacity* is also presumptive evidence of his due appointment to the office, because it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorised to fill. This rule has been expressly adopted by the legislature, in the statutes relating to the excise (*l*) and customs, (*m*), and at

(*k*) See this question discussed post, at end of Chapter *On Declarations against interest*.

(*l*) 7 & 8 Geo. 4, c. 53, sect. 17, enacts, "That if upon the trial of any indictment, information, action, suit, or prosecution whatsoever, or in any other legal or judicial proceeding, any question shall be made, or any doubt or dispute shall arise, touching or concerning the keeping of any office of excise, or whether any person is or was a commissioner or assistant commissioner of excise, or a collector or other officer of excise, or commissioned or appointed to act as such, evidence of the actual keeping of such office of excise, or that such person is, or at the time in question was, reputed to be such commissioner or assistant commissioner, or such collector or other officer, or does or did then act as such commissioner or assistant commissioner, or as such collector or other officer so commissioned and appointed (as the case may require), shall in every such case be admitted and be deemed and taken to be respectively sufficient and legal proof of such facts respectively, without producing or proving the particular commission, appointment, or other authority, whereby such person is or was commissioned or appointed to be such commissioner or assistant commissioner, or such collector or other officer as aforesaid, unless by other evidence the contrary be made to appear; any law, custom, or usage to the contrary thereof notwithstanding."

(*m*) 8 & 9 Vict., c. 87, sect. 131, enacts that, "All persons employed for the prevention of smuggling under the direction of the commissioners of Her Majesty's customs, or of any officer or officers in the service of the customs, shall be deemed and taken to be duly employed for the prevention of smuggling; and the averment in any information or suit, that such party was so duly employed shall be sufficient proof thereof, unless the defendant in such information or suit shall prove to the contrary." Sect. 132 enacts, "That if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, evidence of his having *acted* as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof be given to the contrary." See also 8 & 9 Vict., c. 85, s. 7, and c. 93, s. 75.

common law has been held applicable to lords of the treasury (*n*), masters in chancery, though exercising especial powers (*o*), commissioners for taking affidavits (*p*), surrogates (*q*), sheriffs (*r*), justices of the peace (*s*), constables (*t*), though appointed by commissioners under a local public act (*u*), trustees under a turnpike act (*v*), churchwardens (*x*), vestry-clerks (*z*), trustees empowered to raise church-rates under a local act (*a*), and indeed, it extends to all public officers (*b*). Moreover, no distinction is recognised, though the appointment must, of necessity, be in writing (*c*), or though the action be brought in the name of the officer (*d*), or though the proceedings be criminal, and in the highest degree penal, as, for instance, a trial for the murder of a constable in the execution of his duty (*e*). Neither will any exception to this rule be recognised, even in cases where parties are indicted for offences committed by them in their character of public officers. Thus, if a person employed by the post-office be indicted for stealing or embezzling a letter (*f*), his formal appointment need not be proved, but it will suffice to show that he has acted in the capacity charged (*g*); though, in an Irish case, it appears to have been held

(*n*) *R. v. Jones*, 3 Camp. 131, per Lord Ellenborough.

(*o*) *Marshall v. Lamb*, 5 Q. B. 115.

(*p*) *R. v. Howard*, 1 M. & Rob. 187, per Patteson, J.; *R. v. Newton*, 1 C. & Kir. 480. (*q*) *R. v. Verelst*, 4 Camp. 432, per Lord Ellenborough.

(*r*) *Bunbury v. Matthews*, 1 C. & Kir. 382, per Parke, B.

(*s*) *Berryman v. Wise*, 4 T. R. 366, per Buller, J.

(*t*) *Id.*

(*u*) *Butler v. Ford*, 1 Cr. & M. 662. (*v*) *Pritchard v. Walker*, 3 C. & P. 212.

(*x*) *R. v. Mitchell*, per Abbott, C. J., cited 2 St. Ev. 307, note (*r*).

(*z*) *M'Gahey v. Alston*, 2 M. & W. 206.

(*a*) *R. v. Murphy*, 8 C. & P. 310, per Coleridge, J.

(*b*) *M'Gahey v. Alston*, 2 M. & W. 211, per Parke, B.; *Marshall v. Lamb*, 5 Q. B. 123, per Patteson, J. *See v. Young. 8.2 B. 63*

(*c*) See cases cited in preceding notes to this section.

(*d*) *M'Gahey v. Alston*, 2 M. & W. 206, 211; *Cannell v. Curtis*, 2 Bing. N. C. 228; 2 Scott, 379, S. C. This last case was an action for libel; the declaration averred that the plaintiff *had been appointed* and was assistant overseer; the plea traversed the appointment. Tindal, C. J., intimated a strong opinion that it was only necessary for the plaintiff to prove that he acted as assistant overseer. This ruling was cited by Parke, B., in 2 M. & W. 209.

(*e*) *R. v. Gordon*, 1 Lea. C. C. 515.

(*f*) See 1 Vict., c. 36, §§ 25, 26.

(*g*) *Clay's case*, 2 East, P. C. 580; *R. v. Rees*, 6 C. & P. 606, per Parke, B.; *R. v. Borrett*, id. 124, per Littledale & Bosanquet, Js., & Bolland, B.; *R. v. Townsend*, C. & Marsh. 178; *R. v. Goodwin*, 1 Lew. C. C. 100.

by Mr. Justice Crampton, that some proof of acting with the *sanction* of the Post-office authorities was necessary (*h*).

§ 112. The same presumption prevails with respect to certain relations of life. Thus, if persons live together ostensibly as man and wife, the law will, in favour of morality and decency, presume that they are legally married (*i*). There are, however, two exceptions to this rule, for on indictments for bigamy, and in actions for criminal conversation, an actual valid marriage must be proved, and even the proof of a ceremony, which the parties suppose to be sufficient to constitute the relation of husband and wife, is not enough, but it must be shown to be sufficient according to law for that purpose (*k*). These exceptions rest on the ground, that such proceedings, being of a penal nature, require the strictest proof; and a further reason for the exception in cases of adultery seems to be, to prevent parties from setting up pretended marriages for evil purposes (*l*).

§ 113. How far this rule applies to persons suing or being sued as *professional men*, or as filling particular situations, does not very distinctly appear. In an action against a clergyman for non-residence, Lord Mansfield held that the plaintiff was not bound to prove the admission, institution, and induction of the defendant, but that it was sufficient to show that he had received tithes and acted as the incumbent of the parish (*m*). So, when an attorney brought an action of defamation against a party for slandering him in his profession, by threatening to strike him off the rolls for misconduct, he was allowed to recover damages, on proof that he had acted as an attorney, without showing his due admission and enrolment (*n*). So, in an action for penalties under the Post-horse Act, brought by the plaintiff as farmer general, proof of his

(*h*) *R. v. Trenwyth*, Ir. Cir. R. 172. *Sed qu.*

(*i*) *Doe v. Fleming*, 4 Bing. 266.

(*k*) *Catherwood v. Caslon*, 13 M. & W. 261, 265, per Parke, B.

(*l*) *Morris v. Miller*, 4 Burr. 2057; 1 W. Bl. 632, S.C.; *Birt v. Barlow*, 1 Doug. 171, 174, per Lord Mansfield.

(*m*) *Bevan v. Williams*, 3 T. R. 635, note (*a*).

(*n*) *Berryman v. Wise*, 4 T. R. 366.

appointment was dispensed with as against the defendant, who had previously accounted with him in that capacity (*o*); and, not to multiply instances, the same laxity of evidence is said to be allowable in actions brought by surgeons (*p*) or attornies for their fees, or by parsons for their tithes (*q*). But these cases appear to rest not so much, if indeed at all, upon the presumption now under discussion, as on the ground that the opposite party has, by his admissions, either by word or deed, rendered it unnecessary to prove the actual appointment (*r*). In cases, therefore, where no such admission has been made, the safer, if not the necessary course will be to prove the appointment in the ordinary manner; and, indeed, this seems consistent with modern practice and with the latest decisions.

§ 114. Thus, in an action brought by a physician for defamation, where the slanderous words *denied* that the plaintiff was a doctor of medicine, proof that he had acted as such, coupled with evidence of a Scotch diploma, was held insufficient to entitle him to a verdict; and Lord Denman observed, "No doubt a person complaining of a slander upon him, in a particular character, must prove that he possesses that character when the slander does not admit it" (*s*).

(*o*) *Radford v. M'Intosh*, 3 T. R. 632.

(*p*) *Gremaire v. Le Clerk Bois Valon*, 2 Camp. 144. In that case, plaintiff proved that he had performed several surgical operations for defendant, but it was contended that he could not maintain the action, as he was not a member of the College of Surgeons. He however recovered a verdict, and on a motion to set it aside, the court discharged the rule, on the ground that there was no proof that the plaintiff was *not* duly licensed. See *Cope v. Rowlands*, 2 M. & W. 160.

(*q*) *Radford v. M'Intosh*, 3 T. R. 632; *Berryman v. Wise*, 4 T. R. 367, per Buller, J. See *Green v. Jackson*, Pea. R. 236.

(*r*) See per Chambre, J., in *Smith v. Taylor*, 1 New. R. 210—212; also, the judgment of Heath, J., who observes,—“It seems to me that where a defendant, in the course of the transaction on which the action is founded, has *admitted* the title, by virtue of which the plaintiff sues, it amounts to *prima facie* evidence that the plaintiff is entitled to sue.” *Id.* p. 208.

(*s*) *Collins v. Carnegie*, 1 A. & E. 696, 703; 3 N. & M. 703, S. C.; *Pickford v. Gutch*, 8 T. R. 305, note (*a*), per Buller, J.; *Smith v. Taylor*, 1 New. R. 196. In this case the court was equally divided on the question whether proof of acting as a physician was sufficient, but Sir J. Mansfield and Heath, J., who held the affirmative, also thought that the words of the slander—"Dr. S. has upset all we have done, and die he (the patient) must"—implied an admission of the character

It may be observed, however, on this case, that the question, whether acting as a physician is sufficient *prima facie* proof of being one, was not directly decided, because the plaintiff, not content with resting his case on such evidence, proceeded to prove that he had received the degree of doctor of medicine from the University of St. Andrew's; and as the court held that this did not entitle him to practise in England, he could not, of course, fall back upon proof of practice upon the legality of which he himself had, by his evidence, thrown doubt. In another action of slander, brought by a collector of tolls, the plaintiff was nonsuited on failing to prove his appointment to that office, but it does not appear that any evidence was offered that he ever acted in that capacity (*t*); and the same observation applies to the cases of *Savage (u)* and *Cortis v. Kent Waterworks Co. (v)*, in the former of which the plaintiff, who sued as a barrister, relied, not on his practice, but on the book of the Society of Lincoln's-inn, containing the order for his call; and in the latter, a party, suing in the character of treasurer to certain commissioners, proved his appointment to the office. Still, these cases, though not direct authorities, tend to show what the practice has been, and so far support the view, that the rule, which renders evidence of acting *prima facie* proof of due appointment, is confined to cases where the parties occupy a *public* situation, or, perhaps, where the question of appointment is *not directly* at issue. The case of *R. v. Jones (w)*, where, on an indictment against an apprentice for a fraudulent enlistment, it was held that the indenture must be proved, is an authority on neither side of this question, for that decision rested on the ground, that, as the *actual and legal* binding was the fact which constituted the gist of the offence, this could only be proved by the best evidence.

§ 115. In actions brought by apothecaries for their charges, they

in which the plaintiff sued. It must be remembered, that in actions of this kind, where the declaration states, as matter of inducement, that the plaintiff holds a certain office, or belongs to a particular profession or trade, no evidence is required to support this statement unless it be distinctly denied by the defendant's plea; for the plea of not guilty admits the facts stated in the inducement. Reg. Gen. H. T.

4 Will. 4; 5 B. & Ad. ix.

(*t*) *Sellers v. Till*, 4 B. & C. 655.

(*u*) 1 Doug. 356 n. (4).

(*v*) 7 B. & C. 314.

(*w*) 1 Lea. C. C. 174.

must prove, even under the general issue (*x*), either their actual practice on, or prior to, the 1st (*y*) of August, 1815, or that they have duly obtained their certificate from the Master, Wardens, and Society of Apothecaries (*z*), or that, before the 1st of August, 1826, they held a commission or warrant as surgeon, or assistant surgeon, or apothecary in Her Majesty's army, or as surgeon or assistant surgeon in the royal navy, or in the service of the East India Company (*a*). To prove this last fact, it is not necessary to produce the warrant or commission; and where the plaintiff omitted to produce such document, or to account for its absence, but called an army paymaster, who proved that in 1815, twenty-seven years before the trial, the plaintiff had acted as assistant surgeon of a regiment, and that he the witness had paid him his salary, which he said he should not have done, unless he had seen the warrant, the court held that the evidence was sufficient (*b*).

§ 116. Other [presumptions of this class are founded upon the experience of human conduct *in the course of trade*; men being usually vigilant in guarding their property, and prompt in asserting their rights, and diligent in claiming and collecting their dues. Thus, where a bill of exchange, or an order for the payment of money, or delivery of goods, is found in the hands of the drawee, or a promissory note is in the possession of the maker, a legal presumption is raised, that he has paid the money due upon it, and delivered the goods ordered (*c*). So, a receipt for the last year's or quarter's rent is *prima facie* evidence of the payment of

(*x*) *Wagstaffe v. Sharpe*, 3 M. & W. 521; *Shearwood v. Hay*, 5 A. & E. 383; 6 N. & M. 831, S. C.; *Wills v. Langridge*, id.; *Morgan v. Ruddock*, 4 Dowl. 311; 1 H. & W. 505, S. C.

(*y*) This seems to be the proper date. Compare § 21 of 55 Geo. 3, c. 194, with § 20 of that act, and § 4 of 6 Geo. 4, c. 133. See also observations of Parke, B., in *Steavenson v. Oliver*, 8 M. & W. 240; and *Apoth. Co. v. Roby*, 5 B. & Al. 949; 1 D. & R. 564, S. C.

(*z*) 55 Geo. 3, c. 194, s. 21. See ante, § 9.

(*a*) 6 Geo. 4, c. 133, §§ 4, 11; *Steavenson v. Oliver*, 8 M. & W. 234.

(*b*) *Milbanke v. Grant*, 3 Q. B. 690; 3 G. & D. 31, S. C.

(*c*) *Gibbon v. Featherstonhaugh*, 1 Stark. R. 225; *Egg v. Barnett*, 3 Esp. 196; *Garlock v. Geortner*, 7 Wend. 198; *Alvord v. Baker*, 9 Wend. 323; *Weidner v. Schweigart*, 9 Serg. & R. 385; *Shepherd v. Currie*, 1 Stark. R. 454; *Brembridge v. Osborne*, ib. 374.

all the rent previously accrued (*c*). But the mere delivery of money by one to another, or of a bank cheque, or the transfer of stock, unexplained, is presumptive evidence of the payment of an antecedent debt, and not of a loan (*d*). The same presumption arises upon the payment of an order or a draft for money, namely, that it was drawn upon funds of the drawer, in the hands of the drawee. But in the case of an order for the delivery of goods, it is otherwise, they being presumed to have been sold by the drawee to the drawer (*e*).

§ 117. Under this head of presumptions from the course of trade, may be ranked the presumptions frequently made from the regular course of business in a *public office*. Thus, postmarks on letters are *prima facie* evidence that the letters were in the post-office at the time and place therein specified (*f*); and if a letter properly directed (*g*) is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed (*h*). This last presumption is, in several cases, rendered conclusive by the legislature. Thus, under the Companies' Clauses, the Lands' Clauses, and the Railway Clauses Consolidation acts, summonses, notices, writs, and other proceedings, may be served upon the respective companies or promoters subject to these acts, by being transmitted through the post directed to their principal offices (*i*); and a like service of notices by the company upon the shareholders will, under the first-

(*c*) 1 Gilb. Evid. (by Lofft), 309; *Brewer v. Knapp*, 1 Pick. 337.

(*d*) *Welch v. Seaborn*, 1 Stark. R. 474; *Breton v. Cope*, Pea. R. 30; *Lloyd v. Sandiland*, Gow, R. 13, 16; *Cary v. Gerrish*, 4 Esp. 9; *Aubert v. Walsh*, 4 Taunt. 293; *Boswell v. Smith*, 6 C. & P. 60; *Patton v. Ash*, 7 Serg. & R. 116, 125.

(*e*) *Alvord v. Baker*, 9 Wend. 323, 324.

(*f*) *Fletcher v. Braddyll*, 3 Stark. R. 64; *R. v. Johnson*, 7 East, 65; *R. v. Watson*, 1 Camp. 215; *R. v. Plumer*, R. & R. 264.

(*g*) Where the address was "Mr. Haynes, Bristol," held insufficient to raise this presumption, *Walter v. Haynes*, R. & Moo. 149, per Abbott, C. J.

(*h*) *Saunderson v. Judge*, 2 H. Bl. 509; *Bussard v. Levering*, 6 Wheat. 102; *Lindenberger v. Beal*, ib. 104; *Warren v. Warren*, 1 C. M. & R. 250; *Kufh v. Weston*, 3 Esp. 54; *Dobree v. Eastwood*, 3 C. & P. 250; *Story on Bills*, § 300.

(*i*) 8 & 9 Vict., c. 16, § 135; c. 18, § 134; c. 20, § 138.

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named act, be in general deemed sufficient (*j*). Somewhat similar clauses are inserted in a variety of other statutes (*k*). Again, at common law, the time of clearance of a vessel, sailing under a license, has been presumed to have been indorsed upon the license, which was lost, upon its being shown, that without such indorsement, the custom-house would not have permitted the goods to be entered (*l*). So, on proof that goods, which cannot be exported without license, were entered at the custom-house for exportation, it will be presumed that there was a license to export them (*m*).

§ 118. The like presumption is also sometimes drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting (*n*). Thus, the underwriters upon a foreign ship or a foreign voyage, are presumed to know the usages and laws of foreign states, which affect that ship or that voyage, because such knowledge is necessary for the due conduct of the business (*o*). So, an underwriter is presumed to know the contents of Lloyd's Shipping List, because this is a document, to which, in the ordinary course of his business, he has access; but this last presumption is strictly confined to cases where the assured has made no representation inconsistent with the list, which is calculated to mislead the underwriter (*p*). It seems to have been held at Nisi Prius, though it is difficult to understand upon what principle, that, in the absence of proof, partners must be presumed to be interested in equal proportions in the partnership property (*q*).

§ 119. We may here mention one or two presumptions which

(*j*) 8 & 9 Vict., c. 16, § 136.

(*k*) See 7 & 8 Vict., c. 33, § 6; 8 & 9 Vict., c. 100, § 108; 7 & 8 Vict., c. 101, § 72; 10 & 11 Vict., c. 32, § 60; 6 & 7 Vict., c. 18, § 100.

(*l*) *Butler v. Allnutt*, 1 Stark. R. 222.

(*m*) *Van Omeron v. Dowick*, 2 Camp. 44.

(*n*) *Doe v. Turford*, 3 B. & Ad. 890, 895; *Champneys v. Peck*, 1 Stark. R. 404; *Pritt v. Fairclough*, 3 Camp. 305.

(*o*) *Young v. Turing*, 2 M. & Gr. 603, per Lord Abinger; 2 Scott, N. R. 752, S. C.; *Noble v. Kennoway*, 2 Doug. 613, per Lord Mansfield.

(*p*) *Mackintosh v. Marshall*, 11 M. & W. 116.

(*q*) *Farrar v. Beswick*, 1 M. & Rob. 527, per Parke, B.

attach to particular trades, and which, though apparently harsh, are in reality founded on just principles of public policy (*n*). For instance, if goods intrusted to a common *carrier* be lost or damaged, the law will conclusively presume that the carrier has been guilty of negligence, unless he can show that the loss or damage was occasioned by the act of God, or by the Queen's enemies (*o*). So, the loss or damage of luggage, while under the custody of a stage-coachman, a cabman, or even a gratuitous bailee, will raise a *prima facie* inference of want of care, which, in the absence of evidence to the contrary, will render the bailee liable to an action (*p*). So, when chattels have been deposited in a public inn, and there lost or injured, the *prima facie* presumption is that the loss or injury was occasioned by the negligence of the innkeeper or his servants (*q*).

§ 120. With respect to the *boundaries* of property, there are some presumptions which may conveniently here be noticed. Thus, the law presumes that the soil of unnavigable rivers, usque ad medium filum aquæ, together with the right of fishing, belongs to the owner of the adjacent land (*r*); while in navigable rivers and arms of the sea, the soil, *prima facie*, is vested in the crown, and the fishery is public (*s*). Similar presumptions are recognised in respect of land lying on the seashore; that which is covered with the ordinary high water being presumed to belong either to the crown or to the lord of the manor, while, as to the ownership of that which is overflowed only at spring tide, the presumption is

(*n*) Best on Pres. 244, 245.

(*o*) *Ross v. Hill*, 2 Com. B. 890, per Tindal, C. J.; *Coggs v. Bernard*, 2 Lord Raym. 918, per Lord Holt.

(*p*) *Ross v. Hill*, 2 Com. B. 877; *Harris v. Costar*, 1 C. & P. 637; *Coggs v. Bernard*, 2 Lord Raym. 909.

(*q*) *Dawson v. Chamney*, 5 Q. B. 164; *Richmond v. Smith*, 8 B. & C. 9; *Calye's case*, 8 Rep. 32 (*a*).

(*r*) *Carter v. Murcot*, 4 Burr. 2163. Semble that the owner of a several fishery, when the terms of the grant are unknown, is presumed to be the owner of the soil, *Somerset (Duke) v. Fogwell*, 5 B. & C. 875; 1 D. & R. 747, S. C.; *Parthericke v. Mason*, 2 Chit. 658; *Anon. Loft*. 364. Where two parishes are separated by a river, the medium filum aquæ is the presumptive boundary between them, *R. v. Landulph*, 1 M. & Rob. 393, per Patteson, J.

(*s*) *Carter v. Murcot*, 4 Burr. 2163.

in favour of the adjoining proprietor (*t*). So, waste land on the sides, and the soil to the middle of a highway, are presumed to belong to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder (*u*). This rule, being founded on a supposition that the proprietor of the adjoining land, at some former period, gave up to the public for passage, all the land between his inclosure and the middle of the road (*v*), is liable to be rebutted by showing that the road was originally dedicated by some other party (*w*); the presumption may also be repelled by proof that the lord of the manor has exercised acts of ownership, either over the spot in dispute, or over other waste land in immediate connection with it (*x*). As to roads set out under the first general Inclosure Act, "the herbage and grass arising therefrom" are conclusively presumed to belong to the proprietors of the adjoining lands (*y*), and as to those made under the later Act of William the Fourth, the commissioners are directed to award "the grass and herbage growing and renewing upon" them, to such persons as in their judgment are best entitled to the same (*z*). But both Acts are silent respecting the ownership of the *soil*, and, it seems, that as to *that*, no legal presumption can arise in favour of the proprietors of the neighbouring allotments (*a*). Where fields belonging to different owners are separated by a hedge and ditch, the hedge, *prima facie*, belongs to the owner of the field in which the ditch is not; but if there are two ditches, one on each side, the ownership of the hedge must depend upon evidence of acts of ownership (*b*). The common user of a wall, separating

(*t*) *Lowe v. Govett*, 3 B. & Ad. 863; *Blundell v. Catterall*, 5 B. & A. 291, 298, per Holroyd, J.; 304, per Bayley, J.

(*u*) *Doe v. Pearsey*, 7 B. & C. 304; 9 D. & R. 908; *Steel v. Prickett*, 2 Stark. R. 463, per Abbott, C. J.; *Cooke v. Green*, 11 Price, 736; *Scoones v. Morrell*, 1 Beav. 251.

(*v*) *Doe v. Pearsey*, 7 B. & C. 306, per Bayley, J.

(*w*) *Headlam v. Hedley*, Holt, N.P.R., per Bayley, J.

(*x*) *Doe v. Kemp*, 2 Bing. N. C. 102; 2 Scott, 9, S. C.; *Grose v. West*, 7 Taunt. 39; *Anon. Loft*, 358; *Doe v. Kemp*, 7 Bing. 332; 5 M. & P. 173, S.C.

(*y*) 41 Geo. 3, c. 109, § 11.

(*z*) 6 & 7 Will. 4, c. 115, § 29.

(*a*) *R. v. Hatfield*, 4 A. & E. 164, per Lord Denman; *R. v. Edmonton*, 1 M. & Rob. 32, per Lord Tenterden.

(*b*) *Guy v. West*, 2 Sel. N. P. 1324, per Bayley, J. In France, boundary hedges and the trees in them are declared to be common property, "mitoyens," except in certain cases, Code Civil, Art. 670, 673.

lands or houses which belong to different proprietors, is *primâ facie* evidence that the wall, and the land on which it stands, belong to them in equal moieties as tenants in common (c). But this presumption may be rebutted by showing that the wall, in fact, stands on land, parts of which were separately contributed by each proprietor (d). Where a tree grows on the boundary of two fields, so that the roots extend into the soil of each, the property in the tree is presumed to belong to the owner of that land in which it was first sown or planted (e). In the learned work of Mr. Callis on Sewers (f), a distinction has been taken between a bank and a wall; the former, being made of *earth* taken from the adjacent soil, is presumed to belong to the party whose land adjoins thereto; the latter, being built of materials brought from a distance, is, *primâ facie*, the property of the person who is bound to repair it. This distinction has been recognised as sound law in the Court of Common Pleas (g).

§ 121. Other disputable presumptions arise in respect of *infants*. Thus, during the interval between seven years and fourteen, infants are, *primâ facie*, presumed to be unacquainted with guilt, and therefore cannot be convicted, unless the jury shall be satisfied from the evidence that, at the time when the offence was committed, they had a guilty knowledge that they were doing wrong (h). This rule, though perhaps originally adopted, in *favorem vitæ*, with respect to capital offences only (i), has, of late years, been expressly held applicable to all felonies (k); and there seems no reason why, on principle, it should not also be extended to misdemeanors, with the exception, perhaps, of those cases where an infant occupier of lands, charged with the repair of a bridge or road, might be held liable to an indictment for non-repair (l). The test

(c) *Cubitt v. Porter*, 8 B. & C. 257; 2 M. & R. 267, S. C.; *Wiltshire v. Sidford*, 1 M. & R. 404; 8 B. & C. 259, note.

(d) *Matts v. Hawkins*, 5 Taunt. 20; *Murly v. M'Dermott*, 8 A. & E. 138; 3 N. & P. 256, S. C.

(e) *Holder v. Coates*, M. & M. 112, per Littleale, J.; *Masters v. Pollie*, 2 Roll. R. 141; *contra*, *Waterman v. Soper*, 1 Lord Raym. 737; *Anon.* 2 Roll. R. 255.

(f) P. 74, 4th Ed.

(g) *Newcastle (Duke) v. Clark*, 8 Taunt. 627, 628, per Park, J.

(h) 1 Russ. C. & M. 1—5.

(i) 1 Hale, c. 3.

(k) *R. v. Owen*, 4 C. & P. 236.

(l) *R. v. Sutton*, 3 A. & E. 597, 612.

of juvenile exemption propounded by Lord Hale, is whether the accused was capable of discerning "between good and evil" (*m*); words sufficiently indefinite, since they may either apply to legal responsibility or to moral guilt (*n*); and many children of tender years, though perfectly well aware that it is wrong to take what does not belong to them, and who are consequently, according to this test, fit subjects for punishment, may yet be only partially acquainted with the sinful nature of theft, and be wholly ignorant that it is a crime against the law of the land. It seems, therefore, to be a law savouring of harshness which permits a child, under such circumstances, to suffer the same punishment as it inflicts upon a grown person. Indeed, the loose and unsatisfactory manner in which this merciful presumption of infantine innocence is practically rebutted, cannot be more clearly exposed than by referring to one of the latest statistical returns of juvenile delinquents, by which it appears that, out of 297 children under the age of fifteen, committed in the metropolis alone during the year 1844, 238 have been actually convicted; and of these no less than 36 have been transported (*o*). If in all these cases *malitia supplevit ætatem*, no one will dispute but that malice has had much to supply.

§ 122. With respect to *married women*, also, the law recognises certain presumptions. Thus, if a wife commit a felony (*p*) other than treason or homicide, or, perhaps, highway robbery, in

(*m*) 1 Hale, 27.

(*n*) See 30 Law Mag. p. 24, and article on M'Naughten's trial in Leg. Obs. for May 27, 1843, as to the dangerous and unphilosophical nature of this test.

(*o*) Porter's Statistical Tables, part 14, pp. 149, 151, 152, 153. In 1844, 1596 children, under the age of fifteen, were committed for trial in England and Wales. Porter's Progress of Nation, p. 656.

(*p*) There may be some doubt as to the crimes exempted from this presumption. "Thus Lord Hale, in one part of his Pleas of the Crown, vol. i., pp. 45, 47, asserts that the presumption is recognised in all cases excepting treason and murder; but in later passages, id. p. 434, 516, he excludes from its operation manslaughter also, and cites as his authority a passage from Dalton, in which manslaughter is *not* mentioned, Dalt. c. 104, p. 267; new ed. c. 157, p. 503. Mr. Serjt. Hawkins makes the exceptions consist of treason, murder, and robbery, 1 Hawk. c. 1, p. 4, while Mr. Justice Blackstone, in the 1st vol. of his Commentaries mentions only treason and murder, c. 15; and in the 4th vol. c. 2, excepts also crimes that are mala in se, and prohibited by the law of nature, as murder and the like. * * We would gladly see the exception extended to all

company with her husband (*p*), the law presumes that she acted under his coercion, and, consequently, without any guilty intent, unless the fact of non-coercion be distinctly proved. This presumption appears, on some occasions, to have been considered conclusive, and is still *practically* regarded in no very different light, especially when the crime is of a flagrant character (*q*); but the better opinion seems to be, that, in every case, the presumption *may now* be rebutted by *positive* proof that the woman acted as a free agent (*r*); and in one case that was much discussed (*s*), the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury under the circumstances proved. Whether the doctrine of coercion extends to any misdemeanors may admit of some doubt, but the better opinion seems to be, that, provided the misdemeanor be of a serious nature, as, for instance, the uttering of base coin (*t*), the wife will be protected in like manner as in cases of felony, although it has been distinctly held that the protection does not extend to assaults and batteries (*u*), or to the offence of keeping a brothel (*v*). Indeed, it is probable that in all inferior misdemeanors, this presumption, if admitted at all, would be held liable to be defeated, by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony (*w*).

§ 123. Other presumptions are founded on the experienced *con-*

capital felonies, if not to all crimes punishable with transportation, and thus abolish a rule of law, which was originally founded on doctrines that no longer prevail, and which every married man knows is often diametrically opposed to the fact."—30 *Law Mag.* pp. 9, 11.

(*p*) In *R. v. Stapleton*, 1 Jebb, C. C. 93, the majority of the judges appeared to think that this presumption did not apply to cases of highway robbery.

(*q*) 1 Hale, 45; *R. v. Archer*, 1 Moo. C. C. 143.

(*r*) See 7 Rep. of Cri. Law Com. p. 21; 30 *Law Mag.* p. 9—12; *R. v. Hughes*, 2 Lew. C. C. 229; 1 Russ. C. & M. 22., S. C.; *R. v. Pollard*, 8 C. & P. 553, per Tindal, C. J., and Vaughan, J., in a case of arson where the husband was bedridden. See also *R. v. Smith*, Ir. Cir. R. 459.

(*s*) *R. v. Stapleton*, 1 Jebb, C. C. 93.

(*t*) *R. v. Conolly*, 2 Lew. C. C. 229, per Bayley, J.; *R. v. Price*, 8 C. & P. 19; *Anon.* Ir. Cir. R. 374.

(*u*) *R. v. Cruse*, 8 C. & P. 541; 2 Moo. C. C. 53, S. C.; *R. v. Ingram*, 1 Salk. 384.

(*v*) *R. v. Williams*, 10 Mod. 63; 4 Bl. Com. 29.

(*w*) *R. v. Cruse*, 8 C. & P. 541; 2 Moo. C. C. 53, S. C.

tinuance, or immutability, for a longer or shorter period, of human affairs. When, therefore, the existence of a person, or personal relation, or a state of things, is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question. Thus, where a jury found that a certain custom existed up to the year 1689, the court held, that in the absence of all evidence of its abolition, this was in legal effect a verdict finding that the custom still subsisted at the time of the trial in 1840 (*x*). So, in settlement cases, the court will presume that a son, though long since arrived at manhood, has continued unemancipated, as in the days of his infancy, unless there be some evidence to rebut this presumption, as, for instance, if proof be given that he has separated from his family (*y*). So, in the absence of evidence to the contrary, the settlement of a pauper (*z*), or the appointment of a party to an official situation (*a*) will, at least for a reasonable time, be presumed to continue in force. So, a partnership, tenancy, or other similar relation, once shown to exist, is presumed to continue, till it is proved to have been dissolved; and therefore, where a partnership was admitted to have been in existence in 1816, it was, in the absence of all evidence to the contrary, presumed to be still continuing in 1838 (*b*). So, where a tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation, and this presumption still prevails, though the rent has been advanced (*c*), and though the original lessor has assigned his interest to a third party, or being a clergyman, has resigned his living, and a fresh incumbent has succeeded him (*d*). The opinions, also, of individuals, once entertained and expressed, and their state of mind, once proved to

(*x*) *Scales v. Key*, 11 A. & E. 819.

(*y*) *R. v. Lilleshall*, 7 Q. B. 158, explaining *R. v. Oulton*, 5 B. & Ad. 958; 3 N. & M. 62, S. C.

(*z*) *R. v. Tanner*, 1 Esp. 306, per Ashurst, J.

(*a*) *R. v. Budd*, 5 Esp. 230, per Lord Ellenborough.

(*b*) *Clark v. Alexander*, 8 Scott, N. R. 161. See also *Alderson v. Clay*, 1 Stark. R. 405.

(*c*) *Digby v. Atkinson*, 4 Camp. 275, per Lord Ellenborough.

(*d*) *Hutton v. Warren*, 1 M. & W. 466.

exist, are presumed to remain unchanged, till the contrary appears. Thus, all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God, till it is shown from his own declarations. In like manner, every man is presumed to be of sane mind, till the contrary is shown; but if derangement or imbecility is proved or admitted at any particular period, it is presumed to continue, till disproved (*e*), unless it be obviously of a partial or temporary character (*f*).

§ 124. So, where a person is once shown to have been living, the law, in the absence of proof that he has not been heard of within the last seven years, will presume that he is still alive; unless after a lapse of time considerably exceeding the ordinary duration of human life. In the civil law the legal presumption of life ceases at the expiration of one hundred years from the date of the birth (*g*), and the same rule appears to have been adopted in Scotland (*h*), but in England, no definite period has been conclusively fixed, during which the presumption is allowed to prevail. In several old cases, where feoffments for terms varying from ninety-nine to eighty years have been made to particular tenants, the possibility of their surviving the expiration of the terms has been neglected in determining the nature of the remainders (*i*); and the book of a tithe-collector, written seventy-four years before, has been admitted in evidence, without proof that any inquiries had been made for the writer (*k*). But where the term was for sixty years only, the court

(*e*) *Att.-Gen. v. Parnter*, 3 Bro. Ch. Ca. 443; *Blake v. Johnson*, Milw. Eccl. Ir. R. temp. Radcliff, 164—166.

(*f*) *Walcot v. Alleyn*, Milw. Eccl. Ir. R. temp. Radcliff, 69; *Legeyt v. O'Brien*, id. 334—337; *Airey v. Hill*, 2 Add. 209; *White v. Wilson*, 13 Ves. 87; *Hall v. Warren*, 9 Ves. 605, 611.

(*g*) *Vivere etiam usque ad centum annos quilibet præsimitur, nisi probetur mortuus*. *Corpus Juris Glossatum*, tom. 2, p. 718, note (*g*); 1 *Mascard. de Prob. Concl.* 103, note 5; *Campegius Tract. de Test. reg.* 350.

(*h*) *Morison*, *Presump.* xvi. *Carstairs v. Stewart*, 1734; *Hubback*, *Ev. of Suc.* 168. For other foreign laws on same subject, see *Hubback*, *Ev. of Suc.* 758, 759.

(*i*) *Weale v. Lower*, *Pollex.* 67, per Lord Hale; *Napper v. Sanders*, *Hutt.* 119; *Lord Derby's case*, *Lit. Rep.* 370.

(*k*) *Jones v. Waller*, 1 *Price*, 229. See also *Doe v. Davies*, 16 L. J. (N.S.) Q. B. 218, 222.

took into consideration the possibility of the termor living after its expiration (*l*), and the deposition of a witness taken sixty years before the trial has been rejected, no search having been made for the party, and no account being given of him (*m*). In an action of ejectment, where the lessor of the plaintiff, to prove his title, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were allowed to presume, not only that these persons were dead, but, in the absence of all evidence to the contrary, that they had died unmarried and without issue (*n*).

§ 125. Although the presumption of life will continue for a period exceeding sixty years, if no inquiry has been made for the party, whose death is relied upon, this presumption will be bounded within far shorter limits, if proof be given of his continuous unexplained absence from home, and of the non-receipt of intelligence concerning him. In such case, after the lapse of *seven years*, the presumption of life ceases, and the burden of proof is devolved on the other party (*o*). This period was inserted, upon great deliberation, in the statutes respecting bigamy (*p*), and the statute concerning leases for lives (*q*), and has since been adopted from

(*l*) *Beverley v. Beverley*, 2 Vern. 131.

(*m*) *Benson v. Olive*, 2 Str. 920; *Manby v. Curtis*, 1 Price, 225.

(*n*) *Doe v. Deakin*, 3 C. & P. 402; 8 B. & C. 22, S. C., by name of *Doe v. Wolley*. There, Bayley, J., in stating that the jury had properly made this presumption, relied on the general rule, that things must be presumed to remain in the same state, in which they are proved to have once been, unless there is some evidence of a subsequent alteration, 3 C. & P. 406; but it is submitted that the rule was in this case strained somewhat beyond its legitimate extent; for if presumptions are founded, as they should be, on the experienced course of events, it was surely more probable that one out of four brothers should marry and have children, than that they should all die unmarried. In *Doe v. Griffin*, 15 East, 293, where a similar question arose, evidence negating the marriage of the party, who was presumed to have died without issue, was given; and in *Richards v. Richards*, id. 294, note *a*, where the lessor of the plaintiff claimed as heir by descent, and proved the death of his elder brothers, the court held that he must further show that they died without issue, since in ejectment no presumption could be admitted against the person in possession.

(*o*) *Hopewell v. De Pinna*, 2 Camp. 113; *Rust v. Baker*, 8 Sim. 443; *Loring v. Steineman*, 1 Metc. 204.

(*p*) 1 Jac. 1, c. 11, § 2; 9 Geo. 4, c. 31, § 22.

(*q*) 19 Car. 2, c. 6, § 2.

analogy, in other cases (*r*). But although a person, who has not been heard of for seven years, is presumed *to be dead*, the law raises no presumption as to the *time* of his death: if, therefore, it be important to any one to establish the precise period during those seven years, at which such person died, he must do so by evidence of some sort, and can neither rely, on the one hand, upon the presumption of death, nor on the other, upon the presumption of the continuance of life (*s*).

§ 126. In a late case, in which it appeared that a brig had sailed from Demerara for England in December 1828, had touched at Dominica on the 24th of that month, and had never afterwards been heard of, Vice-Chancellor Knight Bruce, after a lapse of seven years, presumed that the vessel and her crew were lost before the 29th of January, 1829, evidence being given that the average length of a voyage from Dominica to England was under two months, and that the West Indian latitudes were subject to hurricanes, which were so much more prevalent between the 1st of August and the 10th of January, that premiums for insurance during that time were double what they were at other periods of

(*r*) *Doe v. Jesson*, 6 East, 85; *Doe v. Deakin*, 4 B. & A. 433; *King v. Paddock*, 18 Johns. 141. In America, it is not necessary that the party be proved to be absent from the United States; it is sufficient if it appears that he has been absent for seven years, from the particular State of his residence, without having been heard of. *Newman v. Jenkins*, 10 Pick. 515; *Innis v. Campbell*, 1 Rowle, 373; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Wambough v. Shenk*, 1 Penningt. 167; *Woods v. Woods*, 2 Bay, 476; 1 N. Y. Rev. Stat. 749, § 6. As to cases where the presumption of life conflicts with that of innocence, see § 92, ante.

(*s*) *Doe v. Nepean*, 5 B. & Ad. 86; 2 N. & M. 219, S. C.; *Nepean v. Doe d. Knight*, 2 M. & W. 894, in Ex. Ch., Lord Denman, in pronouncing the judgment of the court, observes—"It is true the doctrine will often practically limit the time for bringing the action of ejectment in such cases, [viz. where the lessor of the plaintiff claims as grantee in reversion of an estate]; and circumstances may be supposed, as of a lease for seven years, commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiries respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances."—Pp. 913, 914.

the year (*t*). So, upon an issue of the life or death of a party, the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur; as, if the party, when last heard of, was aged, or infirm, or ill (*u*), or had since been exposed to extraordinary peril, such as a storm and probable shipwreck (*v*). But the presumption of the common law, independent of the finding of a jury, does not attach to the mere lapse of time short of seven years (*w*).

§ 127. Where the succession to estates is concerned, the question, which of two persons is to be presumed the *survivor*, where both *perished in the same calamity*, but the circumstances of their deaths are unknown, has been considered in the Roman law and several other codes, but in the common law, no rule on the subject has been laid down. By the Roman law, if it were the case of father and son, perishing together in the same shipwreck or battle, and the son was under the age of puberty, it was presumed that he died first, but if above that age, that he was the survivor; upon the principle, that in the former case the elder is generally the more robust, and in the latter, the younger (*x*). The French code has regard to the ages of fifteen and sixty; presuming that of those under the former age, the eldest survived; and that of those above the latter age, the youngest survived. If the parties were between those ages, but of different sexes, the male is presumed to have survived; if they were of the same sex, the presumption is in favour of the survivorship of the younger, as

(*t*) *Sillick v. Booth*, 1 Y. & Col. 117.

(*u*) *R. v. Harborne*, 2 A. & E. 544, per Lord Denman.

(*v*) *Watson v. King*, 1 Stark. R. 121; 4 Camp. 272, S. C.; *Patterson v. Black*, cited 2 Park. Ins. 919, 920. In the case of a missing ship, bound from Manilla to London, on which the underwriters had voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after the absence of only two years, and administration was granted accordingly, *In re Hutton*, 1 Curt. 595.

(*w*) See further on this subject, Hubback, *Ev. of Succession*, 167, *et seq.*, 758, 759.

(*x*) Dig. lib. 34, tit. 5; De rebus dubiis, lib. 9, § 1, 3; Ib. l. 16, 22, 23; Menoch. de Præsumpt. lib. 1, Quæst. x. n. 8, 9. This rule, however, was subject to some exceptions for the benefit of mothers, patrons, and beneficiaries.

opening the succession in the order of nature (*y*). The same rules were in force in the territory of Orleans, at the time of its cession to the United States, and have since been incorporated into the Code of Louisiana (*z*).

§ 128. This question was much discussed in the common law courts, upon a motion for a *mandamus*, in the case of Gen. Stanwix, who perished, together with his second wife, and his daughter by a former marriage, on the passage from Dublin to England; the vessel in which they sailed having never been heard of. Hereupon his nephew applied for letters of administration, as next of kin; which was resisted by the maternal uncle of the daughter, who claimed the effects, upon the presumption of the Roman law, that she was the survivor. But this point was not decided, the court decreeing for the nephew upon another ground, namely, that the question could properly be raised only upon the statute of distributions, and not upon an application for administration by one clearly entitled to administer by consanguinity (*a*). The point was afterwards raised in Chancery, where the case was, that the father had bequeathed legacies to such of his children as should be living at the time of his death; and he having perished, together with one of the legatees, by the foundering of a vessel on a voyage from India to England, the question was, whether the legacy was lapsed by the death of the son in the lifetime of the father. Sir William Grant, M.R., refused to decide the question by presumption, and directed an issue to try the fact by a jury (*b*).

(*y*) Code Civil, § 720, 721, 722; Duranton, Cours de Droit Français, tom. 6, pp. 39, 42, 43, 48, 67, 69; Rogron, Code Civil, Expli. 411, 412; Toullier, Droit Civil Français, tom. 4, p. 70, 72, 73. By the Mahometan law of India, when relatives thus perish together, "it is to be presumed, that they all died at the same moment; and the property of each shall pass to his living heirs, without any portion of it vesting in his companions in misfortune." See Baillie's Moohummudan Law of Inheritance, 172.

(*z*) Civil Code of Louisiana, art. 930—933; Dig. of Civil Laws of Orleans, art. 60—63.

(*a*) *R. v. Dr. Hay*, 1 W. Bl. 640. The matter was afterwards compromised, upon the recommendation of Lord Mansfield, who said he knew of no legal principle on which he could decide it. See 2 Phillim. 268, n.; Fearn's Posth. Works, 38; *Doe v. Nepean*, 5 B. & Ad. 91, 92.

(*b*) *Mason v. Mason*, 1 Meriv. 308.

But in a late case, it has been held by Vice-Chancellor Knight Bruce, that a presumption of priority of death might be raised from the comparative age, strength, and skill of the parties; and, therefore, where two brothers perished by shipwreck, the circumstances being wholly unknown, but it appeared that the one was twenty-eight years of age, and the master of the ship, while the other was under age, and acted as second mate, it was presumed that the elder, as the stronger and more experienced sailor, survived the younger (c). The prerogative courts, however, adopt the presumption that both sufferers perished together, and that therefore neither could transmit rights to the other (d); and in the total absence of all evidence of the particular circumstances of the calamity, this rule will probably be found the safest and most convenient; but if any circumstances of the death of either party can be proved, there can be no inconvenience in submitting the question to a jury, to whose province it peculiarly belongs.

§ 129. A rule has been adopted in insurance law, that if a vessel has sailed, and no tidings of her have been received within a reasonable time, she shall be presumed to have *founded* at sea (e). By "tidings," are meant, not mere rumours, but some actual intelligence received from persons capable of giving an

(c) *Sillick v. Booth*, 1 Y. & Col. 117, 126.

(d) *Wright v. Netherwood*, 2 Salk. 593, n. (a) by Evans; more fully reported under the name of *Wright v. Sarmuda*, 2 Phill. Ec. R. 266—277, n. (c); *Taylor v. Diplock*, id. 261, 278. 280; *Selwyn's case*, 3 Hagg. Ec. R. 748; in the goods of *Murray*, 1 Curt. 596. In the brief note of *Colvin v. Proc. Gen.* 1 Hagg. Ec. R. 92, where the husband, wife, and infant (if any) perished together, the court seem to have held, that the *prima facie* presumption of law was that the husband survived; but the question was not much discussed; and in *Satterthwaite v. Powell*, 1 Curt. 705, where a husband and wife perished in the same wreck, the court would not presume that he survived, and consequently refused to grant to his representative the administration of property vested in the wife. The subject of presumed survivorship is fully treated by Mr. Burge, in his *Comm. on Colon. and For. Laws*, v. 4, p. 11—29; and by Mr. Hubback, in his *Ev. of Success.* 186 *et seq.*, and 759—764. See also 2 Kent's *Comm.* 435, 436, 4th ed. n. (b).

(e) *Green v. Brown*, 2 Stra. 1199; *Newby v. Reed*, cited 1 Park, Ins. 148; *Koster v. Reid*, 6 B. & C. 19; 9 D. & R. 2, S. C. But in order to recover on a policy, there must be some evidence, that, when the ship left the port of outfit, she was bound upon the voyage insured, *Cohen v. Hinkley*, 2 Camp. 51, per Lord Ellenborough; *Coster v. Innes*, R. & Moo. 333, per Abbott, C. J.

authentic account (*f*) ; and, it seems, that in an action on a policy from an English to a foreign port, the presumption of loss will sufficiently arise, from proof that the ship was not heard of in this country after she sailed, without calling witnesses from the port of destination to show that she never arrived there (*g*). Neither the law of England, nor the usage of merchants, has fixed any definite period after which the assured may demand payment for his loss, in case no intelligence is received respecting the vessel insured ; but a practice has prevailed among insurers of deeming a vessel lost, provided she shall not have been heard of within six months after her departure for any port in Europe, or within twelve months if bound for a greater distance (*h*).

§ 130. Another presumption connected with the law of insurance is this, that if a ship, shortly after sailing, shall, without visible or adequate cause, become leaky, or otherwise incapable of performing the voyage insured, she shall be deemed to have been unseaworthy at the commencement of the risk (*i*). This presumption, however, is not, it seems, of so hindering a nature, as to induce the court to grant a third trial, when two special juries have already concurred in finding a verdict in opposition to it (*k*).

(*f*) *Koster v. Reed*, 6 B. & C. 22, per Bayley, J. In that case a witness stated that a few days after the vessel sailed, he *heard* that she had foundered, but that the crew were saved : Held not sufficient to rebut the presumption of loss which arose from the ship never having arrived at her port of destination, and that plaintiff was neither bound to call any of the crew, nor to show that he was unable to do so.

(*g*) *Twemlow v. Oswin*, 2 Camp. 85, per Sir James Mansfield, C. J.

(*h*) 1 Park, Ins. 149. In Spain and France, the time after which insurance losses may be demanded, is fixed by express regulation. By the ordinances of the former, if a ship insured on going to, or coming from, the Indies, is not heard of within a year and a half after her departure from the port of outfit, she is deemed lost, 2 Magens, 33 ; by those of the latter, if the assured receives no news of his ship, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for those of a greater distance, make his cession to the underwriters, and demand payment, without being obliged to produce any certificate of the loss.—*Ordonnance de la Marine*, Liv. 3, T. 6, des Assur. Art. 58 ; 1 Park, Ins. 149.

(*i*) *Watson v. Clark*, 1 Dow, 344 ; *Munro v. Vandam*, 1 Park, Ins. 469, per Lord Kenyon ; *Parker v. Potts*, 3 Dow, 23.

(*k*) *Foster v. Steele*, 3 Bing. N. C. 892 ; 5 Scott, 25, S. C., per Tindal, C. J., and Park, J. ; *Vaughan and Coltman*, Js., diss.

§ 131. A spirit of comity and a disposition to friendly intercourse are also presumed to exist among nations as well as among individuals, and in the silence of any positive rule, affirming or denying or restraining the operation of foreign laws, courts of justice presume the adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests (*l*). The instances here given, it is hoped, will sufficiently illustrate this head of presumptive evidence.

§ 132. PRESUMPTIONS OF FACT, usually treated as composing the *second general head* of presumptive evidence, can hardly be said, with propriety, to belong to this branch of the law. They are in truth but mere arguments, of which the major premiss is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions, and the validity of arguments. They depend upon their own natural efficacy in generating belief, as derived from those connections, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the system of jurisprudence, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house which, by means of such an instrument, had been burglariously entered. These presumptions remain the same under whatever code the legal effect of the facts, when found, is to be decided (*m*).

§ 133. There are, however, some few general propositions in regard to matters of fact, and the weight of testimony, which,

(*l*) *Bank of Augusta v. Earle*, 13 Pet. 519, 589; Story, *Conf. of Laws*, §§ 36—38.

(*m*) See 3 St. Ev. 932; 6 Law Mag. 370. This subject has been successfully illustrated by Mr. Wills, in his *Circumst. Ev.*, *passim*.

being universally taken for granted in the administration of justice, and sanctioned by the usage of the bench, may with propriety be mentioned under this head. Such, for instance, is the caution given to juries, to place little reliance on the testimony of an accomplice, unless it is confirmed, in some material point, by other evidence. There is no presumption of the common law against the testimony of an *accomplice*; yet experience has shown, that such persons are but little worthy of credit; and on this experience the usage is founded (*m*). A similar caution should prevail in regard to mere *verbal admissions* of a party, this kind of evidence being subject to much imperfection and mistake (*n*). Thus, also, though lapse of time does not, of itself, furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim, *Nullum tempus occurrit regi*, yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted possession. Accordingly, royal grants have been thus found by the jury, after long continued peaceable enjoyment, accompanied by the usual acts of ownership (*o*). So, after less than forty years possession of a tract of land, and proof of a prior order of council for the survey of the lot, and of an actual survey thereof accordingly, it was held in America, that the jury were properly instructed to presume, that a patent had been duly issued (*p*). In regard, however, to crown or public grants, a longer lapse of time has generally been deemed necessary, in order to justify this presumption, than is considered sufficient to authorise the like presumption in the case of grants from private persons.

(*m*) See further as to the corroboration of accomplices in the Chap. On the number of witnesses.

(*n*) 5 C. & P. 542, n. per Parke, J.; *R. v. Simons*, 6 C. & P. 541, per Alderson, B.; *Williams v. Williams*, 1 Hagg. Cons. R. 304. See *post*, under head *Admissions*.

(*o*) *R. v. Brown*, cited Cowp. 110; *Mayor of Kingston upon Hull v. Horner*, Cowp. 102; *Eldridge v. Knott*, Cowp. 215; *Mather v. Trinity Church*, 3 Serg. & R. 509; *Roe v. Ireland*, 11 East, 280; *Goodtitle v. Baldwin*, id. 488.

(*p*) *Jackson v. McCall*, 10 Johns. 377.—“Si probet possessionem excedentem memoriam hominum, habet vim tituli et privilegii, etiam à Principe. Et hæc est differentia inter possessionem xxx. vel xl. annorum, et non memorabilis temporis; quia per illam acquiritur non directum, sed utile dominium; per istam autem directum.” *Mascard, De Probat.* vol. 1, p. 239; *Concl.* 199, n. 11, 12.

§ 134. Juries are also often instructed or advised, in more or less forcible terms, to presume *conveyances between private individuals*, in favour of the party who has proved a right to the beneficial ownership, and whose undisturbed possession, being consistent with the existence of the conveyance required to be presumed, affords reasonable ground for belief that the legal title has, in fact, been conveyed (*q*). This presumption is made, in order to prevent an apparently just title from being defeated by mere formal matter (*r*); but here we may observe, in the language of Chief Justice Tindal (*s*), that “no case can be put in which any presumption has been made, except when a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and *in such case only*, has it ever been allowed.”

§ 135. Subject to these observations, the presumption in favour of a conveyance will, in general, be allowed to prevail, whenever it was the declared *duty* of trustees to convey to the beneficial owner at a specified time, as upon his attainment of the age of majority, or on the death of a cestui que vie, or after the payment of debts, legacies, portions or the like; for in such cases it is reasonable to presume that the trustees have performed their duty, and done what a court of equity would compel them to do (*t*). A like presumption will probably arise where the duty to convey, though not *expressly* declared, may *constructively* be gathered from the object of the trust; as, for instance, where an estate is vested in trustees for a temporary purpose, which has been attained, and no further intention is declared, or can reasonably be inferred, requiring the legal estate to remain outstanding (*u*).

(*q*) *Doe v. Cooke*, 6 Bing. 180, per Tindal, C. J.

(*r*) *Id.*; *Doe v. Sybourn*, 7 T. R. 3, per Lord Kenyon.

(*s*) *Doe v. Cooke*, 6 Bing. 179.

(*t*) *England v. Slade*, 4 T. R. 682; *Doe v. Sybourn*, 7 T. R. 2.; 2 Esp. 496, S.C.; *Wilson v. Allen*, 1 Jac. & Walk. 611, 620, per Sir T. Plumer; *Emery v. Grocock*, 6 Madd. 54, per Sir J. Leach. In *England v. Slade*, a conveyance from the trustees was presumed, though *only three years* had elapsed from the time when they ought to have conveyed.

(*u*) *Hillary v. Waller*, 12 Ves. 239, 251, 252, per Sir W. Grant; *Doe v. Lloyd*,

§ 136. It has been asserted, and probably with correctness, that this presumption will never be made *against* the owner of the inheritance, with the single exception of those cases, where he has attempted to defeat the solemn acts of himself, or of those through whom he claims. Thus, if a mortgagor attempt to set up an outstanding fee as against a mortgagee for years, or the appointee of a devisee in fee dispute the former right of the devisor to grant a lease of the premises in question, on the ground that the legal estate was, at the time of the grant, outstanding in a trustee, the jury, in cases where the estoppel is not pleaded, may still presume a conveyance; for in the first case (*v*) the presumption will be made in favour of the honesty of the mortgagor at the time of the mortgage, though against his interest at the time of the trial; and in the second (*w*) it will equally prevail, in order to give validity and effect to the grant of the devisor, which would otherwise be void.

§ 137. Questions respecting this head of presumptions frequently arose in former times, when juries used to be called upon to presume the surrender of *outstanding satisfied terms*; but by an excellent act (*x*), which was passed in the year 1845, these questions were finally settled. The act, after reciting that "the assignment of satisfied terms has been found to be attended with great difficulty, delay and expense, and to operate, in many cases, to the prejudice of the persons justly entitled to the lands to which they relate," enacts, "that every satisfied term of years, which *either by express declaration or by construction of law*, shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall, on that day, absolutely cease and

Pea. Ev. App. 41, per Lawrence, J. These cases tend to establish a doctrine somewhat more favourable to presumptions than that stated in the text, but they have not met with general approbation from the profession. See 2 Sug. V. & P. 196; Mathews, Presump. Ev. 215—217.

(*v*) Per Abbott, C. J., in *Doe v. Hilder*, 2 B. & A. 790.

(*w*) *Bartlett v. Downes*, 3 B. & C. 616, 622, per Abbott, C. J.

(*x*) 8 & 9 Vict., c. 112. The rough draft of the 1st and 2nd sections of this Act was drawn by Mr. Davidson and settled by Mr. Christie. The subject was afterwards submitted to the Law Amendment Society, who sanctioned the proposed amendment; and the Bill was then drawn in its present form by one of the ablest members of that body, and became the law of the land under the auspices of Lord Brougham.

determine as to the land, upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years, which shall be so attendant as aforesaid by *express declaration*, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said 31st day of December, 1845, and shall, for the purpose of such protection, be considered in every court of law and of equity to be a subsisting term." Sect. 2 enacts, "That every term of years now subsisting or hereafter to be created, becoming satisfied after the said 31st of December, 1845, and which by express declaration or construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land, upon the inheritance or reversion whereof such term shall become attendant as aforesaid" (y).

§ 138. Notwithstanding this act, it is perfectly clear that no presumption can be allowed in favour of the surrender of a term, which is still *unsatisfied* (z), or the *continuance* of which is found in a special verdict, or admitted in a special case (a); for whatever individual hardship may result from the rule of law that a plaintiff in ejectment must recover from the strength of his own legal title, it is obviously absurd to permit any inference to be drawn, which is directly opposed, either to the ascertained fact, or to all reasonable belief (b).

(y) § 3 enacts, "That in the construction and for the purposes of this Act, unless there be something in the subject or context repugnant to such construction, the word 'lands' shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share thereof respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

(z) *Doe v. Staple*, 2 T. R. 684, where the lessor of the plaintiff was heir-at-law, and only claimed the premises subject to the charge.

(a) *Goodtitle v. Jones*, 7 T. R. 47; *Roe v. Reade*, 8 id. 118.

(b) See per Bayley, J., in *R. v. Upton Gray*, 10 B. & C. 812.

§ 139. A jury may also, under certain circumstances, presume the surrender of a lease by operation of law; for, although the production by the lessor of a cancelled lease will not warrant the presumption of such a surrender as will satisfy the Statute of Frauds (*c*); yet when that fact was coupled with proof that a new lease had been granted to another party, who, like the former lessee, was a mere trustee for the same *cestui que trusts*, and it further appeared, that when leases were renewed from time to time, the usage was to send in the old lease to be cancelled in the lessor's office, the court held, that from these combined circumstances the jury might infer, that the second lease was granted with the assent of the former tenant, which according to a recognised case (*d*), was as valid a surrender of the first interest by operation of law, as if the former tenancy had been determined in writing (*e*).

§ 140. The same principle has been applied in America to matters belonging to the personalty. Thus, where one town, after being set off from another, had continued for fifty years to contribute annually to the expense of maintaining a bridge in the parent town, this was held sufficient to justify the presumption of an agreement to that effect (*f*). And, in general, it may be said, that long acquiescence in any adverse claim of right is good ground, on which a jury may presume, that the claim had a legal commencement; since it is contrary to general experience for one man long to continue to pay money to another, or to perform any onerous duty, or to submit to any inconvenient claim, unless in pursuance of some contract, or other legal obligation.

§ 141. Again, in actions of trover, the jury will be advised, if not directed, to presume a conversion from unexplained evidence of a demand and refusal (*g*); and if an action be brought against a

(*c*) *Doe v. Thomas*, 9 B. & C. 299; 4 M. & R. 218, S.C.; *Roe v. Archbp. of York*, 6 East, 86. (*d*) *Thomas v. Cook*, 2 Stark. R. 408; 2 B. & A. 119, S.C.

(*e*) *Walker v. Richardson*, 2 M. & W. 882.

(*f*) *Cambridge v. Lexington*, 17 Pick. 222. See also *Grote v. Grote*, 10 Johns. 402; *Schauber v. Jackson*, 2 Wend. 36, 37.

(*g*) *Counce v. Spanton*, 7 M. & Gr. 903; *Stancliffe v. Hardwick*, 2 C. M. & R. 1, 12; *Thompson v. Trail*, 2 C. & P. 334; 6 B. & C. 36; 9 D. & R. 31, S.C.; *Thompson v. Small*, 1 Com. B. 328; *Davies v. Nicholas*, 7 C. & P. 339; *Clendon v. Dinneford*, 5 C. & P. 13; 3 St. Ev. 1160, 1161.

husband for goods supplied to his family or his wife on the order of the latter, they will do well to infer, in the absence of evidence to the contrary, that the wife gave the order as her husband's agent, provided she were living with him at the time, and the articles were neither excessive in quantity, improvident in quality, or extravagant in price (*h*). In fine, this class of presumptions embraces all the connexions and relations between the facts proved, and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is that which prevails in the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another, without the aid of any rule of law ; and therefore it falls within the exclusive province of the jury, who are bound to find according to the truth, even in cases where the parties and the court would be precluded by an estoppel, if the matter were so pleaded. They are usually aided in their labours by the advice and instructions of the judge, more or less strongly urged, at his discretion ; but the whole matter is free before them, unembarrassed by any considerations of policy or convenience, and unlimited by any boundaries but those of truth ; to be decided by themselves, according to the convictions of their own understanding.

(*h*) *Lane v. Ironmonger*, 13 M. & W. 368 ; recognising *Freestone v. Butcher*, 9 C. & P. 647, per Lord Abinger ; *Atkins v. Curwood*, 7 C. & P. 757 ; *Waithman v. Wakefield*, 1 Camp. 120, per Lord Ellenborough.

PART II.

OF THE RULES WHICH GOVERN THE PRODUCTION OF TESTIMONY.

CHAPTER I.

OF THE CORRESPONDENCE OF EVIDENCE WITH THE ALLEGATIONS;
OF THE SUBSTANCE OF THE ISSUE; OF VARIANCE; AND OF
AMENDMENT.

§ 142. THE production of evidence to the jury is governed by certain principles, which may be treated under four general rules. The *first* of these is, that the evidence must correspond with the allegations; but that it is sufficient if the substance only of the issues be proved. The *second* is, that the evidence must be confined to the points in issue. The *third* is, that the burden of proving a proposition at issue lies on the party holding the substantial affirmative. And the *fourth* is, that the best evidence, of which the case in its nature is susceptible, must always be produced. These rules we shall now consider in their order.

§ 143. The pleadings, at common law, are composed of the written allegations of the parties, terminating in propositions distinctly affirmed on one side, and denied on the other, called the issues. If these are propositions of fact, they must be tried by the jury, and the *first rule*, which it is important to remember, is, that *the evidence must correspond with the allegations, but that it is sufficient if the substance of the issues be proved*. As one of the main objects of pleading is to apprise the parties of the specific nature of the question to be tried, and as this object would be defeated, if either party was to be at liberty to prove facts essentially different from those which he himself has stated on the record, as constituting his claim or charge on the one hand, or his defence on the other, the necessity of establishing such a general rule as the present becomes at once apparent, and the only remaining question concerns its limitation and extent. Great strictness was formerly

required in the application of this rule ; almost every disagreement between the allegation and the proof, except in matters clearly impertinent, being held to constitute what was called a *variance*, the consequences of which were as fatal to the party on whom the proof lay, as a total failure of evidence. Thus, in an action of assumpsit for the breach of warranty of a horse, where the declaration stated a general warranty, and the proof was that the defendant had warranted the horse sound everywhere, except a kick on the leg, the plaintiff was nonsuited on account of this variance, although the unsoundness of which he complained, and which he established at the trial, was a dropsy (*a*). So, where a declaration in ejectment described the premises as situate in the united parishes of St. Giles-in-the-Fields, and St. George, Bloomsbury, and it appeared that the parishes were united by act of parliament for the maintenance of the poor, but for no other purpose, and that the premises in question were in the parish of St. George, Bloomsbury, this was held to be a fatal variance, though it was idle to suppose that the defendant could have been misled by the misdescription (*b*). To give but one more instance where hundreds might easily be furnished, a plaintiff was nonsuited in an action for defamation, because the libel, as set out on the record, imputed to him "mismanagement or ignorance," while, according to the evidence, the expressions really used in the libel, which had been destroyed, were "ignorance or inattention" (*c*).

§ 144. The attention of the legislature being at length drawn to the flagrant injustice which was thus constantly occasioned, a partial remedy was provided by the act of 9 Geo. 4, c. 15 (*d*), which

(*a*) *Jones v. Cowley*, 4 B. & C. 445, declared, most justly, by Alderson, B., to be "a great disgrace to the English law," in *Hemming v. Parry*, 6 C. & P. 580.

(*b*) *Goodtitle v. Lammiman*, 2 Camp. 274.

(*c*) *Brooks v. Blanshard*, 1 C. & M. 779 ; 3 Tyr. 844, S.C.

(*d*) This act, after reciting that "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now, in any case, be amended at the trial, and in some cases cannot be amended at any time:" for remedy thereof, enacts, "that it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at Nisi Prius, and any court of oyer and terminer and general gaol

enacts, that every court of record in civil actions, any judge at Nisi Prius, and any court of oyer and terminer and general gaol delivery, whether in England or Ireland, may cause the record, on which any trial may be pending in a *civil action*, or in an indictment or information for any *misdemeanour*—when a *variance shall appear between any matter in writing or in print produced in evidence, and the recital thereof upon the record*—to be forthwith amended in such particular, upon payment of such costs, if any, as the judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared.

§ 145. As this statute, though a salutary measure as far as it went, was found to afford a very ineffectual remedy for an evil which all suitors felt to be highly oppressive, larger powers of amendment were granted in 1833 to the English judges, by the act of 3 & 4 Will. 4, c. 42. Under the 23rd section of this act (e),

delivery in England, Wales, Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanour, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such judge or court shall think reasonable ; and thereupon the trial shall proceed as if no such variance had appeared ; and, in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record ; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

(e) The exact words are these : the 23rd section, after reciting that " great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters and circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record ; and that it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause ; " enacts, " that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the

any court of record in civil actions, or any judge at Nisi Prius, may cause the record, writ, or document, on which any trial may be

nature of a quo warranto, or proceedings on a mandamus, when any *variance* shall appear between the *proof* and the *recital or setting forth*, on the record, writ, or document on which the trial is proceeding, of any *contract, custom, prescription, name, or other matter, in any particular or particulars, in the judgment of such court or judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended* by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs to the other and postponement, as such court or judge shall think reasonable : and *in case such variance shall be in some particular or particulars, in the judgment of such court or judge, not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence*, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable ; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared ; and in case such trial shall be had at Nisi Prius [or by virtue of such writ as aforesaid (*)], the order for the amendment shall be endorsed on the postea or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly : and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had : Provided that it shall be lawful for any party who is dissatisfied with the decision of such judge [at Nisi Prius, sheriff or other officer (†)], respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet." The 24th section enacts, "that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

(*) See next note.

(†) See next note.

pending in a *civil action*, or in an information in the nature of a *quo warranto*, or proceedings on a *mandamus*—when any *variance shall appear between the proof and the recital on the record, &c., of any contract, custom, prescription, name, or other matter, in any particular, in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence*,—to be forthwith amended, on such terms, as to payment of costs or postponing the trial, as the court or judge shall think reasonable; and in case such variance shall be in some particular, in the judgment of such court or judge, *not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby* in the conduct of his action, prosecution, or defence, then the same may be amended upon payment of costs to the other party, and withdrawing the record, or postponing the trial, as such court or judge shall think reasonable. The 24th section provides, that in doubtful cases, the judge, avoiding the responsibility of deciding, may direct the jury to find the facts according to the evidence, and leave the question of the materiality of the variance for the consideration of the court above.

§ 146. After the experience of seven years had proved that the powers granted by this act might be safely exercised, and that the amendments made under them were highly beneficial to the administration of substantial justice, the legislature again interfered in favour of Ireland, and extended to that country similar provisions (*g*). Like powers of amendment have also been given by statute to most of the courts of the United States; and in both England, Ireland, and America, these statutes have, in general, been liberally expounded, in furtherance of their beneficial design. Indeed, since the new rules of pleading have, in this country, restricted parties to one count on one subject of complaint, it would be a grievous hardship if the power of amending were not very liberally exercised (*h*); and, even in cases

(*g*) By 3 & 4 Vict., c. 105, §§ 48, 49, which exactly correspond with the 23rd and 24th sections of 3 & 4 Will. 4, c. 42, excepting that the words included within brackets in the preceding note are not to be found in the Irish act.

(*h*) See per Alderson, B., in *Parry v. Fairhurst*, 2 C. M. & R. 196; per Parke,

of doubt, the better course appears to be to allow the amendment to be made in the first instance, since an improper allowance, at least under the acts of William the Fourth and Victoria (*i*), may be rectified by a new trial, while the judge's discretion in refusing amendments cannot be reviewed by any other tribunal (*k*).

§ 147. It will now be advisable to refer to some of the cases which have been decided under the acts of William the Fourth and Victoria, and the reference will be made at some length, as these decisions will be found not only to illustrate the operation of the statutes, but to explain the general nature of variance, and to mark the distinction between material and immaterial allegations (*l*). And, *first*, as to those cases in which an *amendment has been allowed*. In an action of slander, when the words charged in the declaration were, "S. is to be tried at the Old Bailey, &c.," and those proved to have been really spoken were, "*I have heard* that S. is to be tried, &c.," the court held that the variance might be amended on payment of costs, though it was urged, that, as the expression "*I have heard*" reduced the charge from a direct assertion to mere idle gossip, the defendant was prejudiced by the amendment, because, had these words been

B., in *Sainsbury v. Matthews*, 4 M. & W. 347, and in *Ward v. Pearson*, 5 M. & W. 18; per Williams, J., in *Evans v. Fryer*, 10 A. & E. 615; per tot. cur. in *Smith v. Knowelden*, 2 M. & Gr. 561; 9 Dowl. 402, S.C., as to the act of 3 & 4 Will. 4, c. 42, §§ 23 & 24;—and *Masterman v. Judson*, 8 Bing. 230; 1 M. & Sc. 307, S.C., per Tindal, C. J., as to the act of 9 Geo. 4, c. 15.

(*i*) It has been much questioned whether the court in banc has any jurisdiction to revise the decision of the judge at Nisi Prius, either in allowing or refusing an amendment under 9 Geo. 4, c. 15; *Parks v. Edge*, 1 C. & M. 429; 3 Tyr. 364; 1 Dowl. 643, nom. *Parker v. Ade*, S.C.

(*k*) *Doe v. Errington*, 1 A. & E. 750; 3 N. & M. 646; 1 M. & Rob. 344 (n), S.C.; *Jenkins v. Phillips*, 9 C. & P. 768, per Coleridge, J.; *Whitwill v. Scheer*, 8 A. & E. 309, per Patteson, J. But in *Pullen v. Seymour*, 5 Dowl. 164, the judge having refused to amend a declaration on a bill of exchange, which omitted the date when the bill was payable, and having nonsuited the plaintiff, the Court of Exchequer is reported to have set aside the nonsuit upon payment of costs, and to have allowed the plaintiff to amend, and the defendant to plead de novo. *Sed qu.*

(*l*) Those who wish to understand the *old* doctrine of variance, and to trace its oppressive operation, previously to the passing of the remedial statutes, will find the subject fully and ably treated in the last edition of Mr. Starkie's work on Evidence, 1 vol., 430—494. See also 1 Ph. Ev. 503, *et seq.*

originally declared upon, he might have suffered judgment by default, or otherwise have pleaded a justification (*m*). Mr. Justice Bosanquet observed, that the introduction of the words "I have heard" left the slander as actionable as before, although the amount of damages might be lessened;—that a variance, which is not material to the issue raised, but which may affect the quantum of damages, was not within the contemplation of the legislature when speaking of the "merits of the case;"—and that, as the damages were given for the words as *proved*, and as the defendant did not apply to amend his pleadings, or to put off the trial, it did not appear how he could have been prejudiced in his defence (*n*). This case, therefore, is important, as showing that an amendment should not be refused, simply because it may lessen the amount of damages, provided that it cannot affect the substantial line of defence. In another action of slander, where the only variance was that the words stated in the declaration were in the English language, while the expressions proved were Welsh, an amendment was allowed; but the judge, thinking that the defendant *might*, by the mistake, have been prejudiced in the conduct of his defence, postponed the trial till the morrow, and made the plaintiff pay the costs of the day, and deposit for them £15 instant, subject to taxation (*o*). This appears to have been rather severe upon the plaintiff, as it is difficult, if not impossible, to discover in what manner the defendant could have been prejudiced by the error in the declaration. In another action of defamation, where the declaration alleged, that the defendant published a libel, "*contained in and being an article in a certain weekly paper, called the 'Paul Pry,'*" and it was proved that he gave a slip of printed paper, containing the libellous matter, to several persons to read; but it did not clearly appear that it had been cut from that newspaper, the record was amended, without any terms being imposed on the plaintiff, by striking out the allegation marked in Italics (*p*). So, where, in setting out slanderous expressions, the word "purchasers"

(*m*) *Smith v. Knowelden*; 2 M. & Gr. 561; 9 Dowl. 402; 2 Scott, N. R. 657, S.C.

(*n*). 2 M. & Gr. 565.

(*o*) *Jenkins v. Phillips*, 9 C. & P. 766, per Coleridge, J.

(*p*) *Foster v. Pointer*, 9 C. & P. 718, per Gurney, B.

had, apparently by some mistake, been inserted in the declaration for the word "houses," the court allowed an amendment, as the opposite party could not have been misled (g).

§ 148. The case of *Whitwill v. Scheer* (r) is important as showing that where a declaration in assumpsit states a special contract, and then contains an *erroneous* allegation in conformity with its *supposed legal effect*, such allegation may either be struck out, or so altered as to express correctly the real meaning of the contract. In that case, the declaration set out the charter-party on which the action was brought, with certain memoranda indorsed; it then alleged mutual promises, and added a promise by the defendant to have an agent at a certain place, in order to exercise an option given to him by the charter-party and memoranda. To disprove the plea of non-assumpsit, the charter-party and memoranda were alone given in evidence, and it was then objected for the defendant, that the plaintiff must be non-suited on the ground of variance, since the promise, as to having an agent, was not proved to have been expressly made, and could not be implied from the charter-party, and the promise to perform its terms. The court admitted, that the objection must have prevailed, had the added promise been meant to apply to some contract not contained in the charter-party, but they held that as it, in fact, was intended merely as a formal, though erroneous, statement of the legal effect of that which was contained therein, the variance might well be cured, either by striking out the added promise altogether, or by stating the legal effect properly; and the amendment was allowed without any terms as to costs, though an affidavit was made, that the defendant went to trial with the intention and expectation of contesting the allegation as it originally stood.

§ 149. In several cases an amendment has been made, where the contract, or tort, or custom declared upon, has turned out to be either *more or less comprehensive* than the one proved. Thus, the statement of a *general* warranty of a horse has been amended

(g) *Pater v. Baker*, 16 Law, J., N.S., C.P., 124. *3 C. B. 231, p. 6.*

(r) 8 A. & E. 301; 3 N. & P. 391, S.C. But see *Bowers v. Nixon*, 2 C. & Kir. 372, cited post, § 153.

by substituting an allegation of a *qualified* warranty, where the defence did not depend upon the qualification introduced (*s*). So, where the declaration alleged that the defendant promised to lay out certain money in the purchase of a *government annuity*, and then averred as a breach, that he had not done so, but had placed it in the hands of some *private company*, an amendment was allowed, by substituting the word "security" for "annuity," the evidence showing that the money had in fact been received for the purpose of investing it in some *government security* (*t*). So, in an action on a wager, which appeared in the pleadings to be, that a certain railway should be completed *for the general conveyance of passengers* within six years, the plaintiff alleged such completion, which was traversed by the defendant. At the trial, it appearing in evidence that the bet simply was that the railroad should be completed, the judge amended the record by striking out of the declaration and plea the words "for the general conveyance of passengers;" and the court held that he was right in so doing, as the alteration, so far from prejudicing the defendant, imposed an additional burden of proof on the plaintiff, who was bound to show that the railroad was complete for all purposes; for the carriage of goods, as well as of passengers (*u*). So also, where a journeyman carpenter sued his master for the expenses he had incurred in returning, with his tools, from the country to town, and the declaration was founded on a contract, in which a general custom of the trade for the master to pay such costs was engrafted, but it appeared in evidence that the custom was, in fact, a qualified one, and did not apply to cases, where the man, while in the country, was discharged for misconduct, or left his master's service of his own accord, the record was amended, on payment of such costs as the alteration caused, by inserting these exceptions, and adding averments that the plaintiff's claim was not effected by them (*v*). So, where an action of assumpsit was brought for the use and

(*s*) *Hemming v. Parry*, 6 C. & P. 580, per Alderson, B.; *Mash v. Densham*, 1 M. & Rob. 442, per id.

(*t*) *Gurford v. Bayley*, 3 M. & Gr. 781; 4 Scott, N. R. 398; 1 Dowl. N. S. 519, S. C.

(*u*) *Evans v. Fryer*, 10 A. & E. 609; 2 P. & D. 501, S. C.

(*v*) *Read v. Dunsmore*, 9 C. & P. 588, per Coleridge, J.

occupation of "standings, market-places, and sheds," and the plaintiffs relied upon an agreement, which, being put in evidence, turned out to be a demise by them to the defendant of certain "tolls," which the latter might collect from different tradesmen who occupied the stalls of a market, the word "tolls" was inserted in the declaration, the plaintiffs paying the costs of the amendment (*w*).

§ 150. In other actions a like amendment has been allowed, where a contract, a duty, an instrument, or other matter has been *misdescribed* on the record. Thus, in *Hanbury v. Ella* (*x*), the declaration stated that the defendants, in consideration of the plaintiffs supplying beer to a third party, promised to *pay* them the amount of the beer so supplied, and in support of this statement a written *guarantee* was put in. This was a variance, since the declaration showed an *original* liability created, while the evidence merely proved a *collateral* one, but the court allowed an amendment to be made, by substituting the word "guarantee" for "pay," as the mistake could not, under the circumstances, have misled the defendants. So, the record has been amended, where the declaration alleged an undertaking by the defendants to carry and deliver certain goods, and the proof was that the undertaking was to forward them (*y*); where, to an action on a bill of exchange, the plea averred that the bill was accepted on an agreement that it should be in satisfaction of a large sum lost, in part at hazard, and in part at *vingt-un*, and no proof was given of money lost at *vingt-un* (*z*); where a guarantee was alleged in the declaration to have been given in consideration of advances to be made by A, and it appeared by the guarantee that the advances might be made by A, or by any member of his firm (*a*); where an agreement to grant a lease was stated in the pleadings to have been made between the defendant and the plaintiff, and it appeared at the trial that the real agreement was between the

(*w*) *Mayor of Carmarthen v. Lewis*, 6 C. & P. 608, per Parke, B.

(*x*) 1 A. & E. 61; 3 N. & M. 438, S.C.

(*y*) *Parry v. Fairhurst*, 2 C. M. & R. 190; 5 Tyrwh. 686, S.C.

(*z*) *Cooke v. Stratford*, 13 M. & W. 379.

(*a*) *Chapman v. Sutton*, 2 Com. B. 634, 644; *Boyd v. Moyle*, id. 644.

defendant and two other persons, devisees in trust under the will of one Miller, of the first part, and the plaintiff of the other part, but that it had been executed by the plaintiff and defendant alone (*b*); where the contract, as alleged in the declaration, was, that the defendant should build a room, booth, or building, and fit it up according to certain plans agreed upon, for the sum of 20*l.*, by the 28th of June, and that proved was, to erect certain seats and tables, to be completed four or five days before the 28th of June, for 25*l.*, and it did not appear that any plans had been prepared, but the defendant had pleaded non-assumpsit, and that the contract was rescinded by consent (*c*); where similar pleas had been pleaded to a declaration, which stated a contract by the defendant to deliver to the plaintiff certain potatoes within a reasonable time, to be paid for on delivery, and the evidence established a contract that the plaintiff should have the potatoes at digging-up time, and that he should find diggers (*d*); where, in an action on a bond, the penalty was stated in the declaration to be 260*l.*, and appeared on the face of the instrument to be 200*l.* (*e*); where the plaintiff brought his action against a sheriff for an escape, and proved a negligent omission to arrest (*f*); where an instrument, declared on as a bill of exchange, appeared by the evidence to be a promissory note (*g*); and where a note was set out in the declaration as made by defendant, dated the 9th of November 1838, and payable on demand, and the instrument proved at the trial was a joint and several note, made by the defendant and his wife, dated the 6th of November 1837, and

(*b*) *Boys v. Ancell*, 5 Bing. N.C. 390. The court in this case held it unnecessary to consider whether or not the variance was fatal, as it might clearly be amended.

(*c*) *Ward v. Pearson*, 5 M. & W. 16; 7 Dowl. 382, S.C. It should be observed that, in this case, the contract as proved, differed from that alleged, in the nature of the work to be done, in the time for doing it, and in the price; yet the court properly held that this was precisely the case which the Act of Parliament was meant to meet.

(*d*) *Sainsbury v. Matthews*, 4 M. & W. 343; 7 Dowl. 23, S.C.

(*e*) *Hill v. Salt*, 2 C. & M. 420.

(*f*) *Guest v. Elwes*, 5 A. & E. 118; 2 N. & P. 230, S.C.

(*g*) *Moilliet v. Powell*, 6 C. & P. 233, per Alderson, B; *Perry v. Fisher*, Sp. Ass. for Surrey, 1844, per Lord Denman, M.S.

payable twelve months after date (*h*). In this last case, the defendant had pleaded that he did not make the note, and the instrument produced differed from that declared upon, in its date, in the parties to it, and in its duration; but there being no proof of the existence of any other note between the parties, Mr. Baron Alderson expressed his opinion that "this was just the case, in which the legislature intended that the discretionary power of amendment should be exercised" (*i*).

§ 151. In like manner, any slight misnomer of the plaintiff's close in an action of trespass (*k*), or the misstatement of a parish (*l*), or the insertion of a wrong (*m*), or impossible (*n*) day of demise in a declaration of ejectment, may be amended; but if the day of demise be laid without mentioning any year, this omission cannot be amended, since it does not constitute a variance between the declaration and the proof. In such case, however, the omission is no ground of nonsuit, and probably is not available on motion in arrest of judgment, but the defendant, if he think fit, may apply to the court, to compel the plaintiff to insert the correct date (*o*). In one case, where a declaration in ejectment alleged a *joint* demise by the two lessors of the plaintiff, and it appeared that they claimed the property as devisees under a will which devised it to them as *tenants in common*, Mr. Justice Taunton refused leave to amend, either by inserting *several* demises, or by striking out the name of one of the lessors, and the plaintiff was consequently nonsuited (*p*). It should, however, be observed, that this decision was pronounced shortly after the passing of the act, and before its operation was distinctly understood; and, perhaps, at the present day, a similar application would not share the same fate, as it is difficult to comprehend how the amendment proposed could have affected the substantial merits of the case. The lessors of the

(*h*) *Beckett v. Dutton*, 7 M. & W. 157; 8 Dowl. 865, S.C. (*i*) *Id.* 158.

(*k*) *Howell v. Thomas*, 7 C. & P. 342, per Coleridge, J., where the close was called "Clover Hill" instead of "Clover Moor."

(*l*) *Doe v. Edwards*, 6 C. & P. 208; 1 M. & Rob. 319, S.C., per Parke, B.

(*m*) *Doe v. Leach*, 3 M. & Gr. 229; 3 Scott, N. R. 509; 9 Dowl. 877, S.C.

(*n*) *Doe v. Hall*, 3 Dowl. N. S. 49; 5 M. & Gr. 795, S.C.

(*o*) *Doe v. Heather*, 8 M. & W. 158.

(*p*) *Doe v. Errington*, 1 M. & Rob. 343; 1 A. & E. 750, S.C.

plaintiff were clearly entitled to recover, whether they sued as tenants in common, or as joint tenants, and the error into which they fell could not have prejudiced their adversary's defence.

§ 152. The cases in which amendments have been *refused* will not detain us long. The first rule which it is important to bear in mind, is, that the act gives no power to amend a mere *omission* in the pleadings. Thus, in an action of trespass for taking certain mirrors and handkerchiefs, where the defendant, in addition to the plea of not guilty, had pleaded a justification as to the taking of the former articles, but, by mistake, had omitted all mention of the latter, he was not allowed to introduce them into the plea (*q*); and a similar application was refused, where, in replevin upon a taking of goods in a public-house and brewery, the avowry was accidentally confined to the taking in the public house (*r*). So, the record cannot be amended, by adding a count for goods sold and delivered to the declaration, or the words "by statute" to a plea of not guilty, unless it clearly appear that the matter sought to be inserted was in the issue as originally delivered (*s*). Neither, in an action of debt against several co-defendants, can the judge strike out of the record the names of any who are not fixed by the evidence (*t*); nor can he, after the jury are sworn, amend the declaration, by encreasing the amount of damages contained therein (*u*); though, in one case, where the declaration alleged a debt of 100*l.* in each of the common counts, and the plaintiff claimed in his particulars of demand 168*l.*, for goods sold, Lord Denman, *before the cause was called on*, allowed the counts to be amended by inserting 200*l.* instead of 100*l.* (*v*); but this amendment was made without reference to the act of William the Fourth, which clearly, in such a case, gave no power to the learned judge. Whether, in order to avoid a fatal variance, the *debt* stated in the declaration may be *increased*, as we have

(*q*) *John v. Currie*, 6 C. & P. 618, per Parke, B.

(*r*) *Bye v. Bower*, C. & Marsh. 262, per *id.*

(*s*) *Ernest v. Brown*, 2 M. & Rob. 13, per Tindal, C. J.; *Forman v. Dawes*, C. & Marsh. 127, per Coleridge, J.

(*t*) *Cooper v. Whitehouse*, 6 C. & P. 545, per Alderson, B.

(*u*) *Watkins v. Morgan*, 6 C. & P. 661, per Littledale, J.

(*v*) *Dew v. Katz*, 8 C. & P. 315.

seen (*x*), it may be *diminished*, may perhaps admit of some doubt, though, on principle, such amendment would seem to be allowable.

§ 153. Again, though the mere impropriety or harshness of an action will have no effect in influencing the decision of the judge (*y*) an amendment will be refused, if the matter sought to be expunged has been purposely and improperly introduced into the declaration, with the view of creating a prejudice against the defendant; as, for instance, where a count in libel contained several averments and innuendoes unfairly connecting the plaintiff with parts of the alleged libel, which, in fact, related to other persons (*z*). So, as the enactments for allowing amendments at *Nisi Prius* were intended to meet variances arising from mere slips or accidents, the judge will be very reluctant to allow an amendment, where the party has intentionally framed his pleading in such a manner as to give rise to the objection; as, for example, if a plaintiff declaring on a deed, were to recite it according to what he contended was its legal meaning, and the court were to hold that its effect in law was something different (*a*).

§ 154. The court will also refuse to amend, if it appear likely that the variance may have prevented the defendant from pleading a good bar to the action (*b*), or if the amendment proposed would in all probability cause the defendant either to demur, or to plead different pleas from those on the record (*c*), or would introduce an entirely new contract and new breach (*d*), or, perhaps even, any entirely new matter (*e*). Thus, in an action of covenant by the assignee of the reversion against the lessee, the declaration, in deducing title to the plaintiff, set out a deed, whereby the premises

(*x*) *Hill v. Salt*, 2 C. & M. 420, cited ante, § 150.

(*y*) *Doe v. Edwards*, 1 M. & Rob. 321, per Parke B.; *Doe v. Leach*, 3 M. & Gr. 230.

(*z*) *Prudhomme v. Fraser*, 1 M. & Rob. 435, per Lord Denman.

(*a*) *Bowers v. Nixon*, 2 C. & Kir. 372, per Maule, J. But see *Whitwill v. Scheer*, 8 A. & E. 301; 3 N. & P. 391, S.C., cited ante, § 148.

(*b*) *Ivey v. Young*, 1 M. & Rob. 545, per Alderson, B.

(*c*) *Perry v. Watts*, 3 M. & Gr. 775, explained in *Gurford v. Bayley*, id. 784, 785; *Frankum v. Earl of Falmouth*, 6 C. & P. 529; 2 A. & E. 452, S.C.

(*d*) *Brashier v. Jackson*, 6 M. & W. 549; 8 Dowl. 784, S.C.; *Boucher v. Murray*, 6 Q. B. 362.

(*e*) *David v. Preece*, 5 Q. B. 440.

were appointed to him. The defendant traversed the appointment, and the deed, on its production, was found to be nugatory as an appointment, not being executed in pursuance of the power. The plaintiff thereupon sought to amend his declaration by setting out the deed at length, and by averring that a relationship existed between the parties, so as to raise a covenant to stand seised to uses; but the court considered that the case was much too complicated for an amendment to be made at *Nisi Prius*. If the declaration had thereby been rendered good, the defendant might have put on the record different pleas from those before pleaded; but if not, then she might have demurred (*f*). So, in an action on the case for diverting a stream of water, to which the plaintiff claimed a right as the possessor of a mill, when, in fact, he was entitled to it as the owner of the adjoining lands, the court considered that the declaration ought not to be amended, as the defendant had traversed the plaintiff's right in respect of the mill, and might have pleaded differently had the declaration claimed the right in respect of the land (*g*). In like manner, when, to a declaration in *assumpsit*, which treated an agreement as an actual demise, and made the breach consist in the plaintiff being evicted from the premises by a stranger, the defendant had pleaded, first, *non assumpsit*; secondly, that the plaintiff did not become tenant *modo et forma*; thirdly, a traverse of the plaintiff's readiness to accept the lease; fourthly, a denial of the stranger's right to evict; and, lastly, a denial of the actual eviction; the court refused to amend the declaration, by substituting, in conformity with the proof, an agreement for a future lease, and laying the breach, as a denial of the defendant's title to grant such lease; inasmuch as such an alteration, by introducing an entirely new contract, and new breach, would render necessary a modelling of all the pleas on the record (*h*). This decision, though probably correct, is calculated to produce much practical injustice, as it is often a question of great difficulty to decide whether a particular instrument is an actual demise or an agreement for a lease (*i*); and yet, since the

(*f*) *Perry v. Watts*, 3 M. & Gr. 775, explained by Maule J. in *Gurford v. Bayley*, *id.* 784, 785.

(*g*) *Frankum v. Earl of Falmouth*, 6 C. & P. 529; 2 A. & E. 452; 4 N. & M. 330, S.C. (*h*) *Brashier v. Jackson*, 6 M. & W. 549; 8 Dowl. 784, S.C.

(*i*) See Woodfall's L. & T. 118—130, and the cases there cited, which are so

new rules, the plaintiff is not permitted to declare in the alternative, two counts being only allowable, when a distinct subject matter of complaint is intended to be established in respect of each (*k*). Again, where, to an action on a promissory note, the defendant pleaded that the holder accepted, in satisfaction thereof, another note made by the defendant and a third person; and it appeared in evidence that this other note had been accepted in satisfaction, not of the note declared on, but of an intermediate note, to which the third person was no party, and which was given in satisfaction of the note declared on, the Court of Queen's Bench held, contrary to the opinion of the judge at Nisi Prius, that the pleas could not be amended; for although the ultimate practical effect of the whole transaction might be the same, yet the amendment proposed would not only alter the description of the note in the plea, but would introduce essentially new matter (*l*).

§ 155. Perhaps, also, the judge would decline to act, if it should appear that, on the amendment being made, the defendant could not prove his case by the same witnesses (*m*), though this last circumstance would seem rather to furnish a criterion (*n*), as to whether the variance may have prejudiced the conduct of the defence, than as to its material effect on the merits of the case; and, if this be so, it would afford good ground, not for refusing the amendment altogether, but merely for imposing such terms

contradictory and obscure, as rather to confuse, than to illustrate, the subject. See also *Doe v. Powell*, 7 M. & Gr. 980; and 8 & 9 Vict. c. 106.

(*k*) *Reg. Gen. H. T.* 1834, 5 B. & Ad. ii.

(*l*) *David v. Preece*, 5 Q. B. 440.

(*m*) *Gurford v. Bayley*, 3 M. & Gr. 782. In that case Tindal C. J. observed, "The defendant must have known whether he received the money for any purpose; and, on the amendment being made, he could prove his case by the *same witnesses*. How is his defence altered?" Erskine, J., added, "What other pleas would he have to put on the record? and *what other witnesses to produce?*"

(*n*) In *Cooke v. Stratford*, 13 M. & W. 387, Rolfe, B., observed, "It is always a matter of some difficulty to ascertain whether the opposite party will have been prejudiced or not. One can only, therefore, say in a vague way, that one must look at all the circumstances of the particular case. * * The fairest test is this:—*Supposing the party comes with evidence that would enable him to meet the case as it stands on the record unamended, would the same enable him to meet it as amended?*"

on the plaintiff, with respect to the payment of costs, the withdrawing of the record, or the postponement of the trial, as substantial justice should require.

§ 156. If an objection appear on the face of a declaration, which would be good ground for moving in arrest of judgment, it seems that the judge at *Nisi Prius* cannot permit an amendment to be made; for the object of the statute was to prevent nonsuits on variances, and not to make pleadings good which are vicious in themselves (*o*). So, where to two special counts in *assumpsit*, the defendant pleaded a foreign adjudication of both of the causes of action contained therein, which plea was traversed by the plaintiff, and the judgment, when produced, appeared to apply, if at all, to the first count only, the court refused to amend the issue so as to make it correspond with the judgment as proved (*p*). Again, where a declaration stated a judgment to have been recovered for 50*l.*, to which there was a plea of *nul tiel record*, it seems that an amendment was refused on proof that the judgment was for 25*l.* (*q*). It is not, however, very easy to discover how this variance could have been material to the merits of the case. The substantial question was, whether a particular judgment had been recovered, and not as to the specific amount of such judgment; and if it could be successfully urged, that the issue raised by the pleadings was, whether precisely such a record as that alleged in the declaration was in existence, and that as this was negatived by the proof, the defendant was entitled to judgment; the same argument would debar the plaintiff from amending his declaration in all cases, where the allegation sought to be altered was traversed by the defendant's plea.

§ 157. It remains to notice a few *practical* points which have been decided respecting the operation of the act. In the first place, the amendment must be made (if at all) during the trial and before the verdict (*r*); secondly, it must be allowed by

(*o*) *Atkinson v. Raleigh*, 3 Q. B. 79, 86.

(*p*) *Callandar v. Dittrich*, 4 M. & Gr. 68.

(*q*) *Davis v. Dunn*, 1 Dowl. N. S. 317, per Patteson, J.

(*r*) *Braahier v. Jackson*, 6 M. & W. 549; 8 Dowl. 784, S.C.; *Doe v. Long*, 9 C. & P. 777, per Coleridge, J.

the presiding judge, who it seems may be the sheriff or his officer (*s*); thirdly, when in consequence of an amendment being allowed in a declaration, some alteration becomes necessary in the plea, the court will direct this also to be made, should the counsel for the defendant decline to interfere, or to amend the pleadings himself (*t*); fourthly, the court above cannot control the discretion of the judge in *refusing* an amendment (*u*), nor will they interfere, where he has allowed it to be made, unless it clearly appear that he was wrong, or at least it be shown, by affidavit, that the defendant has been prejudiced by the amendment (*v*); fifthly, if the judge directs the jury, by virtue of the 24th section of the act, to find the facts according to the evidence, and thus leaves the court above "to give judgment according to the very right and justice of the case," that court can neither amend the record, nor impose terms on the party availing himself of the statute (*w*); nor, in the event of their deeming the variance material, can they expunge the indorsement of the finding by the jury (*x*); and, lastly, it seems questionable whether the presiding judge himself, in acting upon § 24, can exact conditions from the party in whose favour the issue joined is abandoned and a new one tried (*y*). In all these cases, if both parties consent, a larger power may be exercised, either by the judge at Nisi Prius, by the person substituted in his stead, or by the court above (*z*).

§ 158. With respect to *costs*, it is difficult to lay down any distinct rules, as each case must, in a great degree, depend upon its own particular circumstances; still, it may be advanced as a safe proposition, that the court will not allow any additional expense to be thrown upon the opposite party by reason of any

(*s*) *Hill v. Salt*, 2 C. & M. 420; 4 Tyr. 271, S. C.

(*t*) *Perry v. Fisher*, Sp. Ass. Surrey, 1846, per Lord Denman, M.S.

(*u*) *Doe v. Errington*, 1 A. & E. 750; 3 N. & M. 646; 1 M. & Rob. 344 (n.), S. C.; *Jenkins v. Phillips*, 9 C. & P. 768, per Coleridge J.; *Whitwill v. Scheer*, 8 A. & E. 309, per Patteson, J.

(*v*) *Sainsbury v. Matthews*, 4 M. & W. 347, per Lord Abinger.

(*w*) *Guest v. Elwes*, 5 A. & E. 118; 6 N. & M. 433; 2 N. & P. 230, S. C.

(*x*) *Knight v. McDonall*, 12 A. & E. 438; 4 P. & D. 168, S. C.

(*y*) *Guest v. Elwes*, 5 A. & E. 120, 125.

(*z*) *Parry v. Fairhurst*, 2 C. M. & R. 190; 5 Tyr. 685, S. C., noticed by Patteson, J., in *Guest v. Elwes*, 5 A. & E. 126; *Roberts v. Snell*, 1 M. & Gr. 577; *Brashier v. Jackson*, 6 M. & W. 558.

amendment (z). Thus, if the defendant has put pleas on the record, the proof of which will be rendered unnecessary by the alteration proposed, or has summoned witnesses, whom it will become needless to call, or has otherwise been at any *bonâ fide* expense in preparing to disprove the original allegations, the plaintiff will only be permitted to amend on payment of the costs occasioned by his error; and if it appear probable that the defendant, in consequence of the amendment, will require to alter his pleas, or to summon other witnesses, the trial will at least be postponed, and the plaintiff be obliged to pay the costs of the postponement. In cases where the variance cannot have misled the opposite party, the amendment will be allowed on the payment of mere nominal costs.

§ 159. The instances given above have been selected from the decisions under the acts of 3 & 4 Will. 4, ss. 23 and 24, and 3 & 4 Vict., c. 105, ss. 48 and 49, because those acts have so much enlarged the powers of amendment as to render it sufficient, in most civil actions, to regard their operation alone; still questions may arise, in the decision of which, the language of 9 Geo. 4, c. 15, may form an important guide; and the more so, as that statute, unlike the acts of William and of Victoria, does not, in the enacting clause, restrict the power of amending to those cases only, in which the defect to be amended is not material to the merits (a). Thus, in an action on a guarantee, where the declaration stated an unlimited engagement by the defendant to pay the plaintiff whatever sums he might advance to a third party, and the written contract between the parties was such as to limit the extent of the liability to 2*l.* per week, an amendment was allowed under 9 Geo. 4, c. 15, though it might perhaps have been refused under 3 & 4 Will. 4, c. 42, s. 23, on the ground that the variance was material to the merits (b). If, however, upon such an amendment being made, the defendant were to submit to pay the reduced demand of the plaintiff, he would be entitled to his costs up to that time; but if, dis-

(z) *Smith v. Brandram*, 2 M. & Gr. 250, per Tindal, C. J.

(a) This distinction was pointed out by Tindal, C. J., & Maule, J., in *Smith v. Brandram*, 2 M. & Gr. 250.

(b) *Smith v. Brandram*, 2 M. & Gr. 244.

puting his liability to pay anything, he should choose to proceed and should fail, he would then be allowed only such costs as were occasioned by the misdescription of the contract (c).

§ 160. It should also be observed, that though the acts of 3 & 4 Will. 4, c. 42, and 3 & 4 Vict., c. 105, are limited to civil actions, informations in the nature of a quo warranto, and proceedings on a mandamus, the statute of 9 Geo. 4, c. 15, extends also to *mis-demeanors*. It will, therefore, be expedient briefly to notice a few of the leading decisions on this act, with the view of pointing out how far, in criminal proceedings, the failure of justice, arising from the law of variance, has been remedied. The first fact, in connection with this subject, which can scarcely fail to strike with astonishment the legal inquirer, is the paucity almost amounting to the absence of decisions on the construction of the act, which have hitherto been reported among the crown cases. Nearly twenty years have now elapsed since that act became the law of the land (d), yet our reports, voluminous as they are, contain but three cases (e) in which any question respecting the power of amendment appears to have been discussed. This silence on the part of the reporters is assuredly not to be ascribed to the insignificance of the subject, nor can it be occasioned by the precision of the language employed in the act, since we find that many points have arisen in civil actions as to its correct interpretation. Thus, it has been held, at Nisi Prius, and in banc, that as the variance must arise "between some matter in writing or in print *produced* in evidence, and the writing or setting forth thereof upon the record," the judge has no power to amend unless the document itself, or at least an examined or certified copy (f), be given in evidence; and therefore in cases where, the writings being lost or destroyed, it becomes necessary to prove their contents by parol

(c) *Id.* For another decision on this Act, see *Briant v. Eicke*, M. & M. 359.

(d) Passed 9th May, 1828.

(e) *R. v. Cooke*, 7 C. & P. 559; *R. v. Hewins*, 9 C. & P. 786; *R. v. Christian*, C. & Marsh. 388. In this last case, which was an indictment for perjury, an affidavit was alleged to be entitled "in the cause of the Commissioners" of Charitable Donations, but it was in fact entitled "in the cause of the Commissioner," &c. Lord Denman allowed an amendment.

(f) *Briant v. Eicke*, M. & M. 359, per Lord Tenterden.

testimony, the act of Geo. 4 affords no relief (*g*). But the statute has been held to apply, though it did not appear, *by the record*, that the matter sought to be amended, in conformity with a written instrument produced, was in writing, as where a declaration set out a contract omitting all mention of the fact that it was "by agreement in writing" (*h*).

§ 161. So, also, it has been decided, that the matter sought to be amended need not be recited at *length* on the record, but that it is sufficient if it be referred to in the most compendious manner. Thus, in an action against a witness for disobeying a subpoena, the declaration, after stating that a writ of subpoena, directed to defendant and others, was duly issued, proceeded to aver that a copy of the said writ was left with the defendant. At the trial it appeared, that the copy really left purported to be addressed to the witness and John Doe alone, while the original subpoena was addressed, not only to the defendant, but to two other persons. Upon this the judge directed an amendment to be made by inserting, instead of the words "copy of the said writ," "copy of *so much* of the said writ *as related to the defendant*," and the court above held that the power of amendment was rightly exercised. It was contended in banc, that had the allegation, as amended, been originally made in the declaration, the defendant might have demurred; but the court, without determining the question, whether such demurrer would have been sustainable or not, considered that this objection was taken too late, since if it had been made at the trial, the judge might either have refused to allow the alteration, or have imposed such terms on the plaintiff as would have met the justice of the case (*i*). Again, it has been laid down by one learned judge, who appears to have been constantly actuated by an undefined dread of the danger of allowing amendments, that no variance should be corrected, which might have been avoided by ordinary care (*k*); though it has been justly observed by Mr. Phillips,

(*g*) *Brooks v. Blanshard*, 1 C. & M. 779; 3 Tyr. 844, S. C.

(*h*) *Lamey v. Bishop*, 4 B. & Ad. 479; 1 N. & M. 332, S. C.; overruling, in effect, *Ryder v. Malbon*, 3 C. & P. 595.

(*i*) *Masterman v. Judson*, 8 Bing. 224; 1 M. & Sc. 307, S. C.

(*k*) *Jeff v. Oriell*, 4 C. & P. 22, per Lord Tenterden; *Whitehead v. Scott*,

while questioning the soundness of this ruling, that "to prevent the failure of justice through carelessness or ignorance, was one of the objects of the legislature in passing the act" (l).

§ 162. We have already stated that there are three reported cases, in which applications have been made to the judge to amend indictments for misdemeanors. In two of these the application was refused; one was an indictment for perjury, assigned on an affidavit made for the purpose of setting aside a judgment, which was alleged to have been entered up "in or as of" Trinity Term. The amendment sought was to insert the real time when the judgment was entered up, but Mr. Justice Patteson refused to amend, saying that in criminal cases the power conferred by the statute should be very sparingly exercised (m). The other was also an indictment for perjury, alleged to have been committed before commissioners, and the indictment stated that four commissioners were commanded to examine the witnesses. The commission being put in, it appeared that the four commissioners, "or any three or two of them," had this power. Mr. Justice Coleridge, in refusing to amend, declared that he fully agreed with the sentiments of Mr. Justice Patteson above expressed, and added, as a reason for not readily permitting an amendment in an indictment, that a presentment on the oath of the grand jury was thereby altered (n).

1 M. & Rob. 137, n. per id. In *Ward v. Pearson*, 5 M. & W. 18, Lord Abinger also observed, "I am in general rather averse to making amendments, because I think it tends to produce laxity and carelessness in pleading." This may be, and no doubt is, the case to a certain extent; still, it may well admit of a doubt, whether it be not better for the ends of justice that some declarations and pleas be carelessly drawn, than that suitors should be deprived of their substantial rights, and made to incur a ruinous expense, in consequence of an accidental omission by an irresponsible special pleader. Whatever amendments are allowed, carelessness will never prevail to any great extent, so long as the practitioner is aware that his success must depend upon his legal knowledge and accuracy. The language of Lord Mansfield in *Bristow v. Wright*, 2 Doug. 666, should never be forgotten. "I am very free to own," said his Lordship, "that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because it is *extremely hard on the party to be turned round, and put to expense, from such mistakes of the counsel or attorney he employs. It is hard, also, on the profession.*" (l) 1 Ph. Ev. 518. (m) *R. v. Cooke*, 7 C. & P. 559.

(n) *R. v. Hewins*, 9 C. & P. 786.

§ 163. Now, with great respect for these learned judges, we cannot help expressing a decided opinion that in this particular they are wrong. The object of all penal law is to inflict punishment on the guilty, and thus to deter them and others from committing similar offences. The object of the act of George the Fourth was to render this punishment more certain, by neutralising the effect of trivial variances, which had constantly protected the wrong-doer. So long as there remains the least rational doubt respecting the guilt of a prisoner, let the ample shield of justice screen him from injury; let juries weigh with jealousy the evidence against him; let judges see most clearly that the act, with which he is charged, is an offence against the law; but do not let mere technical errors, which cannot by possibility mislead a defendant, and which have nothing to do with the substantial merits of the case, render the administration of the criminal law a fitting subject for contempt and ridicule. In civil causes, the acts authorising amendments receive a liberal construction, and properly so. Why, then, should an absurdly strict construction be applied in criminal courts? The act of George the Fourth warrants no such distinction, and to introduce into the interpretation of this act the old doctrine "*strictissimi juris*," is to misunderstand and misapply the meaning of that doctrine, and to make the commandments of the legislature of none effect through your traditions. Most sincerely do we hope, that, so far from adopting the spirit of these decisions, the judges will ere long take an opportunity of expressing their marked dissent from them, and that the legislature will extend to all criminal cases the ample powers of amendment, which are now so beneficially exercised by the presiding judges in the civil courts.

§ 164. Many other *Nisi Prius* decisions might here be cited, if it were necessary, to show that the act of 9 Geo. 4, c. 15, forms no remarkable exception to other statutes, so far as relates to the accuracy of the language therein employed; but those already noticed would not have arrested our attention, had they not furnished rules of construction alike applicable to criminal and civil cases. It is sufficient for the present purpose to show, that, while in the civil courts questions were constantly arising on the construction of that act, previously to the passing of 3 & 4 Will. 4, c. 42, scarcely any

points relating to this subject have been discussed in the Crown Courts, and the fair and reasonable inference to be drawn from this fact is, that, in criminal proceedings, the act of George IV. affords a most inefficient relief. In indictments for perjury, libel, and a few other minor offences, amendments may occasionally be made by virtue of the act; but in the great majority, even of misdemeanors, the most trifling variances still defeat the ends of justice, while in prosecutions for felonies, criminals are so protected by legal technicalities, that it is almost a matter of surprise that any should be convicted, except in the most simple cases.

§ 165. Having now examined most of the cases that have been decided under the acts authorising amendments, it will be expedient briefly to notice some general rules which regulate the law of *variance*; since, in the first place, none of those acts apply to felonies, and one alone affords a partial remedy in cases of misdemeanor; and next, although in civil causes a discrepancy between the allegation and the proof, is not, as formerly, fatal, provided that it be not material to the substantial merits, yet it may still entail considerable expense on the party, who is driven to apply for an amendment. It is therefore important to ascertain, upon what occasions the opposite party is entitled to object, that the substance of the issue has not been proved.

§ 166. The first rule, in connection with this subject is, that *surplusage need not be proved*, and the proof, if offered, is to be rejected. The term surplusage comprehends whatever may be stricken from the record without destroying the right of action, or the charge, on the one hand, or the defence on the other. This, it is true, is a loose, and therefore an unsatisfactory, definition; but it is difficult, not to say impossible, to find one more distinct and practical. Each case must, in a great measure, depend on its own particular circumstances, and the best means of ascertaining what will, or will not, amount to surplusage, is by examining the decisions on this subject. The case of *Williamson v. Allison (a)* is a leading authority. That was a declaration in tort, for breach of a warranty

(a) 2 East, 446; cited by Lord Abinger in *Cornfoot v. Fowke*, 6 M. & W. 378.

that some claret was in a fit state to be exported to India, whereas it was at the time, and *the defendant well knew* it was, in a very unfit state. At the trial no evidence was given of the defendant's knowledge, and the verdict being for the plaintiff, a motion was made for a new trial, on the ground that the scienter, having been alleged, ought to have been proved; but the court were unanimously of opinion, that the allegation of the scienter was wholly unnecessary and immaterial, and therefore need not be proved. The grounds for this decision are explained with great clearness by Lord Ellenborough in pronouncing his judgment. "If," said his Lordship, "the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For, if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit." Mr. Justice Lawrence added, "I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, although the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot recover" (b).

§ 167. So, in tort for removing earth from the defendant's land, whereby the foundation of the plaintiff's house was injured, the allegation of bad intent in the defendant need not be proved, for the cause of action is perfect, independent of the intention (c). So, also, in trespass, for driving against the plaintiff's cart, an averment that he was in the cart is immaterial (d). In like manner, where a declaration, after alleging that the plaintiff was possessed

(b) 2 East, 451, 452. See also *Jackson v. Allaway*, 6 M. & Gr. 942; 7 Scott, N. R. 875, S. C.; *Att.-Gen. v. Clerc*, 12 M. & W. 640; *Tempest v. Kilner*, 2 Com. B. 300. (c) *Panton v. Holland*, 17 Johns. 92; *Twiss v. Baldwin*, 9 Conn. 291.

(d) *Howard v. Peete*, 2 Chit. R. 315.

of a pond, and the defendant was possessed of an adjoining close, *used as a private road*, averred that the defendant wrongfully cut in his close *used as a private road* a certain large sewer, and thereby diverted the water from the pond, the court held that the words marked in italics were clearly immaterial, and that the plaintiff might recover damages, though it appeared that the sewer was cut previously to the construction of the road. "What," said Chief Justice Tindal, "has it to do with the wrongful act of the defendant, or the measure of damages which the plaintiff is entitled to claim, whether the defendant used his close as a road, an orchard, or a garden?" (e) So, in an action against the Marshal for an escape (f), the declaration stated that a judgment was recovered in Easter Term, and that in Trinity Term in the same year there was an award of execution; and *thereupon* the defendant was committed. The original judgment and the commitment were proved, but there was no evidence of any judgment in scire facias. The court held that this last allegation being immaterial, because a year had not elapsed from the date of the original judgment (g), no proof was necessary to support it; and they considered that the word "thereupon" was introduced, not for the purpose of connecting the commitment with the judgment in scire facias, but simply with the view of marking the progress of the cause. In a similar action against the Marshal, the plea stated that the debtor returned into custody before action brought, and that thereupon the defendant, before and at the time of the commencement of the suit, kept and detained, and *still doth keep and detain*, him in his custody; to this plea the plaintiff replied *de injuriâ*, and at the trial tendered evidence of a second escape after the commencement of the action, and before plea pleaded. This evidence was rejected by the learned judge, on the ground that the allegation of a detainer after action brought was immaterial to the defence, and was consequently not put in issue by the replication: and the court above supported this ruling (h). So, where a girl ten years old, by

(e) *Dukes v. Gostling*, 1 Bing. N. C. 588, 593.

(f) *Bromfield v. Jones*, 4 B. & C. 380.

(g) *Semble*, the scire facias need not have been alleged or proved, even if execution had not been taken out till after the year and day had expired: per Little-
dale, J., *id.* 285.

(h) *Davis v. Chapman*, 2 M. & Gr. 921. See *Basan v. Arnold*, 6 M. & W. 559;

her *prochein ami*, sued a surgeon in case, and the declaration stated that she had employed him to cure her, and then claimed damages for a misfeasance, the court held that there was no material variance between the allegation and the proof, though the defendant had traversed the statement that the plaintiff had employed him, and it appeared that he had, in reality, been sent for by the mother, and paid by the father, of the child; for either the fact of the girl having allowed him to operate was evidence that she had employed him, and that he had accepted the employment, or, the substance of the issue being, that he was employed to *cure* his patient, it was immaterial *by whom* he was employed, and the statement that he was employed by the plaintiff might be struck out of the declaration and plea (i).

§ 168. Again, if a bill be accepted payable at a particular place, without stating it to be payable there only, it is no variance, in an action against the acceptor, to declare upon it as payable at that place, though such an acceptance is declared by the legislature to be, for all intents and purposes, a general acceptance (j); for a general acceptance, being an engagement to pay anywhere, must include amongst others, the particular place mentioned in the declaration; and it does not lie in the defendant's mouth to say that the bill was not payable at that place, when he has himself referred the parties there for payment (k). So, in an action on a promissory note, where the declaration stated that the defendant made it, "his own proper hand being thereunto subscribed," but it appeared that the note was, in fact, drawn by his son, with his authority; Lord Tenterden held that this was no variance, as the allegation respecting the defendant's handwriting might be rejected as surplusage (l).

Palmer v. Gooden, 8 M. & W. 890; 1 Dowl. N.S. 673, S.C.; Vowles v. Miller, 3 Taunt. 137. (i) Gladwell v. Steggall, 5 Bing. N.C. 733; 8 Scott, 60, S.C.

(j) 1 & 2 Geo. 4, c. 78.

(k) Blake v. Beaumont, 4 M. & Gr. 7, 10. It will be seen that this case depends rather on the doctrine of estoppel, than on that of variance.

(l) Booth v. Grove, M. & M. 182; 3 C. & P. 335, S.C. This case is probably correct law, though, on one occasion, where the declaration contained similar words, with respect to an indorsement which turned out to have been made by procuration, Lord Ellenborough directed a nonsuit, Levy v. Wilson, 5 Esp. 179. In Helmsley v. Loader, 2 Camp. 450, the same learned judge, however, under precisely similar circumstances, would not allow the defendant to raise the objection,

So, also, in an action by indorsee against the drawer or indorser of a bill for default of payment, an allegation of acceptance need not be proved (*m*), except in the case of a bill payable after sight. So, where the holder of a bill averred, as an excuse for not giving notice of dishonour to the drawer, that the latter had no funds in the acceptor's hands, and had sustained no damage from want of notice, this last negative averment was held to be immaterial, though the defendant had pleaded that he had sustained damage, because the acceptor had promised him to provide for the bill (*n*). In an action on a promissory note brought by the indorsee against the maker, the defendant pleaded that he delivered the note to the indorser to enable him to take up a former accommodation note, and that after the note declared on became due, he paid the amount to plaintiff. On a replication *de injuriâ* to this plea, the court held that the averment introductory to the payment of the last-mentioned note might be rejected as surplusage, and need not be proved. It amounted, in fact, to a mere unnecessary statement of the motive which induced the defendant to give the note. Mr. Justice Coleridge observed: "The distinction is between an averment, the whole of which can be got rid of without injury to the plea, and an averment of circumstances essential to the defence, which are stated with needless particularity. In the latter case, the whole averment must be proved as pleaded. In the former case, in civil or criminal pleadings, the whole may be considered as struck out, and therefore need not be proved" (*o*).

§ 169. The distinction here pointed out may be well illustrated by the case of *Bristow v. Wright* (*p*). That was an action on the case against a sheriff, for taking the tenant's goods in execution without satisfying the landlord for a year's rent; and the plaintiff

he having promised to pay, with a knowledge of all the facts; and his Lordship was inclined to think that, even independently of the promise, it was enough to show that the defendant's name was written by an authorised agent. *Levy v. Wilson* may therefore be considered as overruled.

(*m*) *Tanner v. Bean*, 4 B. & C. 312; 6 D. & R. 338, S. C.; overruling *Jones v. Morgan*, 2 Camp. 474. (*n*) *Fitzgerald v. Williams*, 6 Bing. N. C. 68.

(*o*) *Shearm v. Burnard*, 10 A. & E. 593, 596; 2 Per. & D. 565, S. C.

(*p*) 2 Doug. 665; 1 Smith's Lead. Ca. 324, S. C.; explained and confirmed by Buller, J., in *Peppin v. Solomons*, 5 T. R. 497, 498; and by Lord Ellenborough in *Williamson v. Allison*, 2 East, 450. See also *Savage v. Smith*, 2 W. Bl. 1101; *Hoar v. Mill*, 4 M. & Sel. 470.

averred that the rent was reserved *quarterly*, whereas it turned out to be reserved *yearly*. There, had the whole averment as to the reservation of the rent been struck out, the plaintiff could not have maintained his action, because some rent must necessarily have been averred to be due; and therefore, though the plaintiff need not have stated in what manner the rent was reserved, yet, as he had chosen to do so, the defendant was held entitled to avail himself of the defect of proof in that particular. So, if, in justifying the taking of cattle damage feasant, in which case it is sufficient to allege that they were doing damage in the defendant's *freehold*, he should needlessly state a seisin *in fee*, which is traversed, the precise estate which he has set forth becomes an essentially descriptive allegation, and must be proved as alleged (*q*). Upon the same ground it has been held, that if a person be indicted for stealing a live fowl, he cannot be convicted upon evidence showing that he has stolen a dead one (*r*); and an allegation of the colour of an animal, though wholly unnecessary, must, as a matter of description, be proved as laid. So, where an indictment for bigamy described the second wife as a widow, when in fact she had never been married, the misdescription was held fatal, though it was unnecessary to have stated more than her name (*s*); and where a crime, alleged to have taken place "at A., in the county of B., within five hundred yards of the boundary of D., to wit at C., in the county of D.," was proved to have been committed in D., the prisoner was acquitted, Mr. Justice Crampton observing, "If you choose to go out of your way to make a special averment, and to allege a particular place in the indictment, the question is, whether you are bound to prove it. I think you are" (*t*). In these cases, the essential and non-essential parts of the statement were so

(*q*) Leke's case, Dyer, 365; Turner v. Eyles, 3 B. & P. 466.

(*r*) R. v. Edwards, R. & R. 497. Holroyd, J., there observed, that an indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole an animal, the law will intend that he stole it alive.

(*s*) R. v. Deeley, 1 Moo. C. C. 303; but see R. v. Ogilvie, 2 C. & P. 230, where the prosecutor being described as A. B., Esquire, the addition was rejected as surplusage by Burrough, J. So, in R. v. Graham, 2 Lea. 547, where the goods stolen were alleged to be the property of J. H., Esq. *commonly called Earl of C. in the kingdom of Ireland*, it was held that the words marked in italics might be rejected as surplusage.

(*t*) R. v. M'Kenna, Ir. Cir. R. 416; see also R. v. Durore, 1 Lea. 351; 1 East, P. C. 45, S. C.; and R. v. Upton-on-Severn, 6 C. & P. 133.

connected and dovetailed, as to be incapable of separation, and therefore both were considered as alike material.

§ 170. The language of Mr. Justice Coleridge, cited above (*u*), is also important as showing that the law, which rejects surplusage, applies equally in criminal as in civil proceedings. Thus, if a party be indicted for robbery *in the dwelling-house of A. B.* (*v*), or for arson *in the night time* (*w*), the allegations marked in italics may be rejected as surplusage, and consequently need not be proved (*x*). The case of *R. v. Jones* will illustrate this subject (*y*). The repealed act of 9 Geo. 4, c. 41, provided, (*z*) that no person (not a parish patient) should be taken into a lunatic asylum without a certificate of two medical men, containing certain particulars. § 30 enacted, that any person who should *knowingly, and with intention to deceive*, sign such certificate, untruly setting forth such particulars, should be guilty of a misdemeanor; while a second clause made it a substantive offence for any physician, surgeon, or apothecary to sign such certificate, without having visited the patient. The indictment stated that the defendant, being a surgeon, *knowingly, and with intention to deceive, signed a certificate without having visited the patient*, thus blending in one charge two distinct offences. The jury negatived any intent to deceive, but found the defendant guilty; and the court held that the conviction was right, since the averment of intention was mere surplusage. So, where an indictment charged the defendants with conspiring to indict the prosecutor *falsely*, with intent to extort money, they were held to be rightly convicted, though the jury, in finding them guilty of conspiring to indict with the intent alleged, expressly negatived any conspiracy to make a false charge; for the court observed that a conspiracy to prefer an indictment for purposes of extortion was doubtless a misdemeanor, whether the charge were true or false (*a*). If a common-law offence be laid

(*u*) See ante, end of § 168.

(*v*) *R. v. Pye*, 2 East, P. C. 786; *R. v. Johnstone*, id., by all the judges; see also *R. v. Wardle*, R. & R. 9. (*w*) *R. v. Minton*, 2 East, P. C. 1021.

(*x*) For other instances, see *R. v. Phillips*, R. & R. 369; *R. v. Oxford*, id. 382; *R. v. Summers*, 2 East, P. C. 785; *R. v. Hickman*, id. 593; 1 Lea. 318, S. C.; *R. v. Healey*, 1 Moo. C. C. 1; 2 Russ. C. & M. 786—789.

(*y*) 2 B. & Ad. 611.

(*z*) § 29. This act was repealed by 2 & 3 Will. 4, c. 107, which, in its turn, was repealed by 8 & 9 Vict. c. 100, the act now in force.

(*a*) *R. v. Hollingberry*, 4 B. & C. 329.

as committed "against the form of the statute," the allegation may be rejected as surplusage (*b*).

§ 171. A second rule respecting variances is that *cumulative allegations*, or such as merely *operate in aggravation*, are *immaterial*, provided that sufficient is proved to establish some right, offence, or justification, included in the claim, charge, or defence specified on the record. This rule, as applicable to criminal proceedings, was adopted and defined by Lord Ellenborough in the case of *R. v. Hunt* (*c*). There the defendant was charged in an information with *composing*, printing, and publishing a libel, but no evidence was given to show that he was the *author*. His counsel thereupon claimed an acquittal on his behalf, but the learned judge observed, "It is enough to prove publication (*d*). If an indictment charges that the defendant *did and caused to be done* (*e*) a particular act, it is enough to prove either. The distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment, as shows that the defendant has committed a substantive crime therein specified." Thus, on an indictment for murder, the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation (*f*). So, on an indictment for burglary and stealing, with or without a murderous assault (*g*), if the prosecutor establish his case with the exception of proving that the breaking was by night, the prisoner may be convicted of housebreaking (*h*); if no breaking be proved, but the property stolen be laid in the indictment, and be proved by the evidence, to be of greater value than five pounds, the verdict may be guilty of stealing in a dwelling-house to that amount (*i*); if no satisfactory evidence be offered to show either that the house was a dwelling-house, or some building communi-

(*b*) *R. v. Mathews*, 5 T. R. 162.

(*c*) 2 Camp. 583.

(*d*) S. P. in *R. v. Williams*, 2 Camp. 646, per Lawrence, J.

(*e*) S. P. per Lord Mansfield, in *R. v. Middlehurst*, 1 Burr. 400.

(*f*) Co. Lit. 282 a.

(*g*) 7 Will. 4 & 1 Vict. c. 86, § 2.

(*h*) Under 7 & 8 Geo. 4, c. 29, § 12, Eng., and 9 Geo. 4, c. 55, § 12, Ir., amended as to punishment by 3 & 4 Will. 4, c. 44, and 7 Will. 4 & 1 Vict. c. 90, § 1.

(*i*) Under 7 & 8 Geo. 4, c. 29, § 12, Eng., and 9 Geo. 4, c. 55, § 12, Ir., amended as to punishment by 2 & 3 Will. 4, c. 62, and 7 Will. 4 & 1 Vict. c. 90, § 1.; see *R. v. Compton*, 3 C. & P. 418, per Gaselee, J.

cating therewith (*j*); or that it was the dwelling-house of the party named in the indictment; or that it was locally situated as therein alleged; or that the stolen property was of the value of five pounds; still the prisoner may be convicted of simple larceny, provided it appear that any goods were stolen by him (*j*). So, on a charge of stealing in a dwelling-house, with or without menaces (*k*), or of stealing from the person, with or without violence (*l*), the prisoner may be found guilty of larceny, if the evidence be not sufficient to prove the commission of the more aggravated crime (*m*); and an indictment under the statute for horse-stealing, though bad for not describing the animal by any term used in the act, will support a conviction for larceny (*n*). Again, on the same principle, if an indictment for treason or conspiracy charge several overt acts, it is sufficient to prove one (*o*); and, on an indictment for obtaining property by several false pretences, it is not necessary to prove them all, unless they are so connected as to be incapable of separation (*p*), but it will suffice to prove the one or more, by which the property was in fact obtained (*q*).

§ 172. In like manner, if a compound intent, or several intents, be laid in the indictment, and if one part of the compound intent, or each of the several intents, when coupled with the act done, constitute an offence, it will not be necessary to prove the whole as laid. Thus, an indictment for killing a sheep, with intent to steal the whole carcase, will be supported by proof of an intent to steal part of the carcase (*r*). So, a man accused of assaulting a girl

(*j*) *R. v. Bullock*, 1 Moo. C. C. 324, note *a*; *R. v. Brookes*, C. & Marsh. 543, per Patteson, J.; *R. v. Jackson*, cited 2 Russ. C. & M. 801, per Cresswell, J.

(*k*) See 7 Will. 4 & 1 Vict. c. 86, § 6.

(*l*) See 7 Will. 4 & 1 Vict. c. 87, §§ 2, 3.

(*m*) 2 Hale, 302; 2 East, P. C. 784.

(*n*) *R. v. Beaney*, R. & R. 416.

(*o*) Fost. 194.

(*p*) *R. v. Wickham*, 10 A. & E. 34.

(*q*) *R. v. Hill*, R. & R. 190.

(*r*) *R. v. Williams*, 1 Moo. C. C. 107. That case was decided on the act of 14 Geo. 2, c. 6 (now repealed), which speaks, in the alternative, of an intent to steal the whole carcase, or any part of the carcase. The same point seems, however, to have been ruled by Cresswell, J., in *R. v. Marley*, cited 2 Russ. C. & M. 137, which case must have turned on the language of 7 & 8 Geo. 4, c. 29, § 25. This last act uses the words "with intent to steal the carcase or skin, or any part of the cattle so killed" &c. The principle in both cases was the same, namely, "that the offence of intending to steal a part was part of the offence of intending to steal the whole,

with intent to abuse her and carnally know her, may be found guilty of an assault with intent to abuse simply (s); and a party indicted for publishing a libel with intent to defame certain magistrates, and also to bring the administration of justice into contempt, may be found guilty, if the libel was published with *either* of those intents (t). But the intent proved must either correspond with, or be included in, the intent alleged. Thus, it will be a fatal variance, if an indictment for burglary charge an intent to steal, and it be shown that the real intent was to commit rape or murder (u); and a prisoner charged with burglary and stealing, will be acquitted, if no property was taken, though it appear that the house was entered with an intent to steal; and though, had larceny actually been committed, he would have been convicted, without any allegation in the indictment of a felonious intent (v).

§ 173. The rule under discussion has been adopted by the legislature on several occasions. Thus, if a woman be charged with the murder of her infant, she may be convicted of endeavouring to conceal its birth (w); and the act of 7 Will. 4 & 1 Vict. c. 85, § 11, provides, that if a party be indicted for any of the offences thereinbefore mentioned, or for any felony, where the crime charged shall include an assault against the person, the jury, though they acquit him of the felony, may find him guilty of the assault, *if the evidence shall warrant such finding*. The construction of this act is not yet definitively settled, but the better opinion seems to be, that while, on the one hand, the assault of which the prisoner is convicted must be involved in and connected with the identical act, which the Crown charges as a felony (x); so, on the other, it is not necessary that the jury should find any intention to commit such felony (y). Thus, a prisoner charged with rape

and that the statute meant to make it immaterial whether the intent applied to the whole, or only to part," per Cur. 1 Moo. C. C. 111.

(s) *R. v. Dawson*, 3 Stark. R. 62, per Holroyd, J.

(t) *R. v. Evans*, 3 Stark. R. 35, per Bayley, J. (u) 2 East, P. C. 514.

(v) *R. v. Furnival*, R. & R. 445; *R. v. Vandercomb*, 2 East, P. C. 514.

(w) 9 Geo. 4, c. 31, § 14.

(x) *R. v. Guttridge*, 9 C. & P. 471, per Parke, B.; *R. v. St. George*, id. 483; *R. v. Phelps*, C. & Marsh. 180; 2 Moo. C. C. 240, S. C.; *R. v. Crumpton*, C. & Marsh. 597; *R. v. Birch*, 2 C. & Kir. 193, by the fifteen judges.

(y) *R. v. Ellis*, 8 C. & P. 654, per Park, J., and Alderson, B.; *R. v. Boden*,

or murder cannot be convicted of an independent assault, committed at a different time from that when the felony was alleged to have been effected (*z*); and a prisoner indicted for attempting to discharge a loaded pistol at the prosecutor, cannot be found guilty of assaulting him with his fists (*a*); but if the indictment charge an assault with intent to rob, the jury may find the assault, though they expressly negative the felonious intention (*b*). It has been said that, on an indictment for feloniously administering poison, a prisoner cannot be convicted of an assault (*c*); but this would seem to be an erroneous decision, since the principal crime, being one of the offences mentioned in the act of 7 Will. 4 & 1 Vict. c. 85, is expressly included within the operation of § 11 (*d*), and it is obvious that, as poison may be administered in a forcible manner, the evidence might warrant the finding of an assault. Poison, indeed, may, as it seems, be administered in such a manner as not to include an assault, and the case of *R. v. Button* (*e*), where it was held that the mere putting a deleterious drug into coffee, in order that another person might take it, constituted an assault, if the mixture was taken, is probably not law; but even if this be so, the most that can be said is, that on an indictment for administering poison, evidence that the poison was taken will not in all cases warrant a conviction under § 11, and this is by no means tantamount to saying, that, on such an indictment, a prisoner cannot be found guilty of a common assault.

1 C. & Kir. 395, per Parke, B., and Coleridge, J.; *R. v. Birch*, 2 C. & Kir. 193, by the fifteen judges.

(*z*) *R. v. Guttridge*, 9 C. & P. 471; *R. v. Phelps*, 2 Moo. C. C. 240; C. & Marsh. 180, S. C. (a) *R. v. St. George*, 9 C. & P. 483.

(b) *R. v. Boden*, 1 C. & Kir. 395. The case of *R. v. Greenwood*, 2 C. & Kir. 339, is opposed to this doctrine; but it is submitted that that case is not law.

(c) *R. v. Cholewell*, 2 M. & Rob. 531, per Coltman, J.

(d) The words of § 11 are, "on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, *where the crime charged shall include an assault against the person*," &c.; and it is apprehended that, according to the ordinary rule of grammatical construction, the clause marked in italics applies only to the words "for any felony," which immediately precede it. Had the legislature intended that the clause should override the words "for any of the offences hereinbefore mentioned," these words would have been utterly useless, as the offences before mentioned are all felonies, and would consequently have been included in the latter words, "any felony whatever."

(e) 8 C. & P. 660, per Serj. Arabin and the Recorder; questioned by Coltman, J., in *R. v. Dilworth*, 2 M. & Rob. 534.

§ 174. It has also been doubted whether a prisoner could be convicted of an assault, on an indictment for carnally knowing a girl under ten years of age (*f*); but this point has lately been decided in the affirmative (*g*), and it is submitted that this decision is correct. It may, indeed, be urged that to constitute an assault, there must be the absence of consent in the party assaulted; and this doctrine is, to a great extent, true; but we must remember that the legislature, in making it felony to abuse a child under ten years of age (*h*), and in drawing no distinction, with respect to the punishment, between those cases where the child consented and those where she was violently ravished, evidently acted on the presumption, that, under the age of ten, a girl was incompetent to consent upon such a subject. Moreover, in actions of trespass for criminal conversation, the declaration always alleges that the defendant assaulted the plaintiff's wife, and this allegation is supported by proof of an adulterous intercourse, though the wife is shown to have been a consenting party. In two late indictments for rape, where it appeared that the women consented to connexion under the belief that the prisoners were their husbands, the jury were directed to find the prisoners guilty of an assault, and they were sentenced to three years' imprisonment with hard labour (*i*). A boy under fourteen years of age, if indicted for a rape, may be convicted of an assault (*j*); as may also a party charged with abduc-

(*f*) *R. v. Banks*, 8 C. & P. 574, per Patteson, J.; *R. v. Holcroft*, 2 C. & Kir. 341, per Wightman, J., after consulting Cresswell, J. In this last case the indictment did not, as it ought to have done, contain any charge of assault.

(*g*) *R. v. Folkes*, 2 M. & Rob. 460, per Rolfe, B.; *R. v. M'Rue*, 8 C. & P. 641, coram Bosanquet, Coleridge, and Coltman, Js.

(*h*) 9 Geo. 4, c. 31, s. 17. A prisoner cannot be convicted of an assault on an indictment for carnally knowing a girl between the age of ten and twelve years, if she consented; neither, in the event of consent, can he be convicted on a count charging an assault with intent carnally to know her; but he should be indicted for a misdemeanor in attempting to commit a statutable offence. *R. v. Martin*, 2 Moo. C. C. 123; 9 C. & P. 213, S. C.; *R. v. Meredith*, 8 C. & P. 589, per Lord Abinger.

(*i*) *R. v. Saunders*, 8 C. & P. 265, per Gurney, B.; *R. v. Williams*, id. 286, per Alderson, B. If the offence had not been completed, the prisoners could not, under the circumstances stated above, have been found guilty of an assault with intent to commit a rape, though they might have been convicted of a common assault. *R. v. Stanton*, 1 C. & Kir. 415, per Coleridge, J.

(*j*) *R. v. Brimilow*, 2 Moo. C. C. 122; 9 C. & P. 366, S. C.

tion, if he employed any force to the person of the lady, and took her away without her consent (*k*). It is almost needless to add, that on indictments either for burglary with intent to ravish a woman (*l*), or for an unnatural crime committed upon an animal (*m*), the prisoner cannot be convicted of an assault under the statute. It may here be added, that, if upon the trial of an indictment for obtaining money by false pretences, it should appear that the property in question was so obtained as to amount to larceny, the prisoner shall not, by reason thereof, be acquitted (*n*); though proof of obtaining goods by false pretences would not sustain a charge of larceny (*o*).

§ 175. In civil actions the same rule prevails. Thus, in an action for defamation, if the plaintiff allege special damage, he need not prove it, provided the words be actionable *per se* (*p*). So, in an action on a policy of insurance, the material allegation is the loss; but whether total or partial, is a mere question of degree; and if the former be alleged, proof of the latter is sufficient (*q*). "Where, in an action of trespass *quare clausum, fregit*, the defendant pleads a right of way with carriages, and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified" (*r*). So, when, in a similar action, the defendant pleads a right of common of pasture for divers kinds of cattle, *e.g.*, horses, sheep, oxen, and cows, such plea shall be construed distributively; and a similar course will be

(*k*) *R. v. Barratt*, 9 C. & P. 387, per Parke, B.

(*l*) *R. v. Watkins*, 2 Moo. C. C. 217; C. & Marsh. 264, S. C.

(*m*) *R. v. Eaton*, 8 C. & P. 417. If acquitted of the capital charge, the prisoner should be indicted for a misdemeanor in attempting to commit a felony.

(*n*) 7 & 8 Geo. 4, c. 29, s. 53.

(*o*) 2 Russ. C. & M. 27, 28.

(*p*) *Smith v. Thomas*, 2 Bing. N. C. 380, per Tindal, C. J.

(*q*) *Gardiner v. Croasdale*, 2 Burr. 904. It would be extremely unjust on the plaintiff, if this were not the law, as by the new rules, "two counts upon the same policy of insurance are not to be allowed."

(*r*) Reg. Gen. H. T. 4 Will. 4, 5 B. & Ad. X.

adopted in all actions, in which a right of way or common, "or other similar right," shall be pleaded, if the allegations as to the extent of the right are capable of being divided (*s*). Thus, where the defendant justified a trespass under an alleged right of way for the purpose of bringing water and goods from a river, and the jury found the right to fetch water, but negatived the right to fetch goods, the court ordered the verdict to be entered distributively, giving the defendant, as substantially succeeding, the general costs of the cause (*t*). It is, however, material in these cases, that the right proved, though less extensive than that alleged, should be of the same nature with it, and included in it; for otherwise the opposite party might justly complain that he was taken by surprise. Therefore, where, to an action of trespass, the defendant claimed in his plea a general right of way on foot and with horses, cattle, carts, waggons, and other carriages, for the convenient occupation of his close, and the jury found a limited right of carting timber and wood only from the close, the court held that, as the right proved was nowhere alleged in the pleading, the plaintiff was entitled to the entire verdict; but they gave the defendant leave, on payment of costs, to amend the plea according to the facts, the plaintiff being at liberty to reply *de novo* (*u*). It seems scarcely necessary to add, that a party may claim in his declaration a less right than he is able to prove, provided that the lesser right claimed does not differ in kind from, but is included in, the greater right proved (*v*).

§ 176. The power of *finding issues distributively* is highly valuable, as it not only diminishes the danger of variance, but is instrumental in effecting a fair distribution of the costs of the cause (*w*). It has, therefore, been applied to a variety of cases. Thus, when the plaintiff declared in trespass *quare clausum fregit*,

(*s*) Reg. Gen. H. T. 4 Will. 4, 5 B. & Ad. X.

(*t*) Knight *v.* Woore, 3 Bing. N. C. 3, 534; 5 Dowl. 201; 3 Scott, 326, S. C.

(*u*) Higham *v.* Rabett, 5 Bing. N. C. 622; 7 Scott, 827; 7 Dowl. 653, S. C.

(*v*) Duncan *v.* Louch, 6 Q. B. 904, 914; Bailey *v.* Appleyard, 8 A. & E. 167, per Coleridge, J. In this last case it was held, that proof of a party being entitled to a profit à prendre would not support a plea prescribing for an easement.

(*w*) Reg. Gen. H. T. 2 Will. 4, r. 74, 3 B. & Ad. 385, provides, that "no costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs."

and, by her replication, on which the parties went to issue, made title to the three closes mentioned in her declaration, but at the trial gave evidence as to two only; the Court held that the issue was divisible, and that the plaintiff was entitled to a verdict as to the two closes, and the defendants as to the other (*x*). In an action of trespass for breaking and entering the plaintiff's house, and taking and converting his goods, which were described by distinct parcels, issue was joined on a plea, which denied that the house or goods were the plaintiff's; at the trial it appeared that the plaintiff was entitled to the house and one parcel of the goods only, and the Court held that the issue was divisible, and that the verdict must be entered distributively (*y*). So, in ejectment, where the lessor of the plaintiff sought to recover, under one count and one demise, several messuages—some freehold, some copyhold—and succeeded as to the latter, but failed as to the former, the Court held that, since the plea of not guilty raised a distinct issue as to each messuage, the defendant was entitled to his verdict and costs with respect to those on which the plaintiff had failed (*z*). The same rule, it seems, prevails in all cases where the plaintiff declares in a general form, and proceeds for distinct causes of action (*a*); because the plea of not guilty, or non assumpsit, not only raises an issue on each count, but on each allegation of a single count, provided such allegation contains a separate cause of action.

§ 177. If, however, the plaintiff is proceeding for one cause of action only, he will be entitled to a general verdict, though he does not succeed to the extent of his claim, and the defendant cannot even deduct his costs for disproving that portion of the claim which the plaintiff has failed to establish. Thus, in *Anderson v. Chapman* (*b*) an action was brought for negligence in stowing, and otherwise taking care of and conveying, one hundred casks of tallow; the defendants denied negligence "in and about the stowage, or otherwise taking care of and conveying" the goods.

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- (*x*) *Phythian v. White*, 1 M. & W. 216. See *Cox v. Thomason*, 2 C. & J. 498.
 (*y*) *Routledge v. Abbott*, 8 A. & E. 582; *Prudhomme v. Fraser*, 4 N. & M. 512.
 (*z*) *Doe v. Errington*, 4 Dowl. 602; *Doe v. Lewis*, 13 M. & W. 241.
 (*a*) *Anderson v. Chapman*, 5 M. & W. 490; *Knight v. Brown*, 1 Dowl. 730.
 (*b*) 5 M. & W. 483, noticed by *Patteson, J.*, in *Delisser v. Towne*, 1 Q. B. 341.

The plaintiff, having obtained a verdict for injury by negligence in the care taken of a single cask, but not for any injury to the cargo by stowage, it was held that the defendants were not entitled to the costs of any part of the issue. The Court considered that, as proof of any portion of the complaint would sustain the action, the failure as to the rest affected only the amount of damages. So, in *Delisser v. Towne (c)*, the declaration in case stated, that the defendant, without probable cause, had preferred an indictment against the plaintiff for perjury, alleged to have been committed by him as a witness in a cause at Nisi Prius. The indictment, which was set out in the declaration, contained ten assignments of perjury. The defendant pleaded not guilty. Evidence was given of want of probable cause on the last assignment, but on no other, and the plaintiff had a verdict. Upon these facts the Court held that the defendant was not entitled to his costs, with respect to the nine assignments, as to which the plaintiff had failed to establish a want of probable cause.

§ 178. Thirdly, besides the allegations which need not be proved as coming within either of the rules above mentioned, there are certain other averments which the law, for the sake of convenience, in general regards as *formal*. Thus, allegations of *time, place, number, value, quality*, and the like, unless descriptive of the identity of the subject of the claim or charge, or

(c) 1 Q. B. 333. In pronouncing judgment, Lord Denman observed: "Though the indictment contained assignments of perjury upon several parts of the plaintiff's examination upon the trial, yet it was but one charge: and the preferring that charge without probable cause constitutes but one cause of action. The plea of 'not guilty' denies that one cause of action, and amounts to an assertion that the defendant had probable cause for the whole of the indictment. That is one entire issue: and, if there was no probable cause for any part of the charge, the plaintiff was entitled to a verdict. Whether there was or was not probable cause for other parts of the charge, would affect the damages, but could not affect the verdict, or show that the defendant had properly preferred the indictment, that is, with probable cause for every part of it." p. 343. On the subject of distributive issues, see also *Williams v. Great Western Railway Co.*, 8 M. & W. 856; 1 Dowl. N. S. 16, S. C.; *Amor v. Cuthbert*, 1 Dowl. N. S. 160; *Prudhomme v. Fraser*, 2 A. & E. 645, doubted by Lord Abinger and Parke, B., in 5 M. & W. 489, 490, but quoted as sound law by Lord Denman in 1 Q. B. 344; *Nicholson v. Dyson*, 11 M. & W. 545; *Daniel v. Barry*, 4 Q. B. 59.

otherwise rendered material by special circumstances, need not be proved strictly as alleged. A few examples will suffice to illustrate this subject; and first, as to averments of *time* and *place* in criminal proceedings. Every material fact stated in an indictment must be alleged to have occurred on a particular day, at a particular place (*d*); but these allegations need not in general be *true*; and it will be sufficient to prove that the occurrence happened on any day before the bill was found, and at any place within the jurisdiction of the court (*e*). Thus, where an indictment for misdemeanor contained several counts, in each of which a separate offence was laid on the same day, the prosecutor was allowed to give evidence of these offences, though really committed on different days (*f*). Indeed, the date specified in the indictment has been so far disregarded, that where a court had no jurisdiction to try a criminal, except for an offence committed after a certain day, the judges held that no objection could be taken to the indictment in arrest of judgment, for alleging that the act was done before that day, the jury having expressly found that this was not correct (*g*). So, also, in the case of a transitory felony, it is no objection, on the plea of not guilty, that it has been negatively proved that there is no such parish in the

(*d*) *R. v. Holland*, 5 T. R. 624, 625; *R. v. Haynes*, 4 M. & Sel. 214; *R. v. Feargus O'Connor*, 5 Q. B. 16. See 7 Geo. 4, c. 64, § 20.

(*e*) See Arch. Crim. Pl. 37—41; 2 Russ. C. & M. 800—803. The rule, which requires a day to be specified, but does not require that day to be proved, appears to rest on much the same foundation as the argument used by Corporal Trim in telling his unfortunate story of the King of Bohemia. "There was a certain King of Bohemia, but in what year of our Lord,"—"I would not give a half-penny to know," said my uncle Toby. "*Only, an' please your Honour, it makes a story look the better in the face.*" My uncle Toby's reply, "Leave out the date entirely, Trim; a story passes very well without these niceties, unless one is pretty sure of 'em!" is founded on good sense. Either allege a date and prove it, or omit it altogether.

(*f*) *R. v. Levy*, 2 Stark. R. 458, per Abbott, C. J.

(*g*) *R. v. Treharne*, 1 Moo. C. C. 298. In this case the Court claimed jurisdiction under 11 Geo. 4 & 1 Will. 4, c. 66, § 24, which provides that forgers and utterers may be tried in the county where they are apprehended or in custody. That Act came into operation on the 20th July. The prisoner was tried where he was apprehended. The act of forgery complained of was laid in the indictment as having been committed on the 2nd July, but the jury found that it had been committed after the 20th.

county, as that in which the offence is stated to have been committed (e).

§ 179. There are certain *exceptions*, however, to this rule, which it is important to notice. First, in indictments for those offences which the law regards as bearing a *local character*, the proof respecting the place must strictly correspond with the allegation, as any substantial variance will entitle the prisoner to his acquittal. The distinction between local and transitory offences is not very clearly drawn, but in the former category may be safely included, among others, burglary (*f*), but not highway robbery (*g*); house-breaking (*h*); stealing in a dwelling-house (*i*); sacrilege (*j*); riotously demolishing churches, houses, machinery, &c. (*k*); maliciously firing a dwelling-house, perhaps an out-house, but not a stack (*l*); forcible entry (*m*); poaching (*n*); nuisances to highways (*o*); malicious injuries to sea-banks, mill-dams, or other local property. In most of these cases it is sufficient to allege and prove the parish, township, or other local district, less than a county, in which the offence was committed (*p*); but, in some, a more accurate description is necessary. Thus, an indictment for not repairing a highway must specify the situation of the road within the parish, and any material variance between the description and the evidence will be fatal (*q*). So, on an indictment for night poaching, it has been held, by a majority of the judges, that the locus in quo must be described either by name, ownership, occupation, or abutments, and that it is not sufficient to allege that the prisoner was found "in a certain close in the parish of A." (*r*) If the defendant be charged with taking or

(e) *R. v. Woodward*, 1 Moo. C. C. 323; *R. v. Dowling*, Ry. & M. 433.

(f) 1 Russ. C. & M. 826; *R. v. St. John*, 9 C. & P. 40.

(g) *R. v. Dowling*, Ry. & M. 433.

(h) *R. v. Bullock*, cited in n. to 1 Moo. C. C. 324.

(i) *R. v. Napper*, 1 Moo. C. C. 44.

(j) Arch. Cr. Pl. 237.

(k) *R. v. Richards*, 1 M. & Rob. 177. (l) *R. v. Woodward*, 1 Moo. C. C. 323.

(m) 2 Leon. 186.

(n) *R. v. Ridley*, R. & R. 515.

(o) *R. v. Steventon*, 1 C. & Kir. 55.

(p) See *R. v. Napper*, 1 Moo. C. C. 44.

(q) *R. v. Great Canfield*, 6 Esp. 136; *R. v. Upton-on-Severn*, 6 C. & P. 133; *R. v. Steventon*, 1 C. & Kir. 55. See *R. v. March. Dow. of Downshire*, 4 A. & E. 232. If a carriage-way is described as a bridle-way, the variance is fatal, *R. v. St. Weonard*, 6 C. & P. 582. See also *R. v. Lyon*, Ry. & M. 151.

(r) *R. v. Ridley*, R. & R. 515, under the repealed act of 57 Geo. 3, c. 90, § 1;

destroying fish in water adjoining a dwelling-house, it is sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment, or in any such local district adjoining the water (*s*) ; and if the charge be that of stealing oysters, or oyster brood, the bed, laying, or fishery may be described by name or otherwise, without stating it to be in any particular parish, township, or vill (*t*).

§ 180. It would be extremely difficult to advance any sensible argument in favour of this distinction which the law recognises between local and transitory offences. On an indictment, indeed, against a parish for not repairing a highway, it may be convenient to allege, as it will be necessary to prove, that the spot out of repair is within the parish charged ; and in those very few cases, where the statute upon which an indictment is framed gives the penalty to the poor of the parish in which the offence is committed, a similar allegation may be properly inserted (*u*) ; but why a burglar should be entitled to more accurate information respecting the house he is charged with having entered, than the highway robber can claim as to the spot where his offence is stated to have been committed, it is impossible to say ; either full information should be given in all cases or in none. In actions of ejectment it is now sufficient, at least on motion in arrest of judgment, that the declaration should state the county in which the lands lay without further local description (*v*) ; and if a similar latitude of pleading were allowed in all criminal cases, no real hardship would be imposed upon prisoners, while the substantial ends of justice would be greatly promoted.

§ 181. Another *exception* to the rule, which renders it unnecessary

R. v. Crick, 5 C. & P. 508, per Vaughan, B., under 9 Geo. 4, c. 69, § 9. In R. v. Owen, 1 Moo. C. C. 118, where the close was described by name and occupation, but the name proved was different from that alleged, the judges held that the variance was fatal. See R. v. Andrews, 2 M. & Rob. 37.

(*s*) 7 & 8 Geo. 4, c. 29, § 34.

(*t*) 7 & 8 Geo. 4, c. 29, § 36.

(*u*) See 4 & 5 Will. 4, c. 76, §§ 98, 99, as to fines imposed for disobeying the orders of the Poor Law Commissioners.

(*v*) Doe v. Gunning, 7 A. & E. 240.

to prove strictly the allegations of time and place, is recognised in those cases in which records, deeds, bills of exchange, or other *documents*, are recited in the indictment. In such cases, the dates and places alleged, being considered descriptive of the written instruments referred to, must be proved correctly; and in *felonies*, almost every variance between the indictment and the evidence in these respects, will be pronounced fatal. In misdemeanors, indeed, these variances *may* in general be amended, but the judges, as we have seen, have hitherto shown no great readiness to exercise the powers, which the act of 9 Geo. 4, c. 15, has given them (*v*).

§ 182. In civil actions averments of time and place are usually immaterial (*w*); but here, as in criminal proceedings, they should be proved as laid, if they be alleged by way of essential description (*x*). However, since discrepancies on this head would now in almost all cases be amended, it is unnecessary to discuss the matter further in the present work.

§ 183. Allegations of *number* and *value* are also in general immaterial both in actions and indictments. Thus, proof of cutting the precise number of trees alleged to have been cut in trespass; or of the exact amount of rent alleged to be in arrear in replevin; or of the precise value of the goods taken in trespass or trover, is not necessary (*y*). So, proof of a tender of a larger sum will support a plea of tender of a smaller sum, though the plaintiff, by his replication, has denied the tender in manner and form as alleged (*z*). If, however, to such a plea the plaintiff reply a prior or subsequent demand and refusal, the sum stated in the plea becomes material, and the plaintiff must allege and prove a demand of that precise sum (*a*), unless, indeed, the replication

(*v*) See ante, § 162.

(*w*) See *Ring v. Roxborough*, 2 Tyrwh. 468; 2 C. & J. 418, S. C.; *Beesley v. Dolley*, 6 Bing. N. C. 37; *Arnold v. Arnold*, 3 id. 81.

(*x*) *Steph. Pl.* 329, 330; *Nightingale v. Wilcoxson*, 10 B. & C. 215; *Edge v. Strafford*, 1 C. & J. 391; *Fox v. Keeling*, 2 A. & E. 670.

(*y*) *Co. Lit.* 282 a; *Steph. Pl.* 336; *Hutchins v. Adams*, 3 Greenl. 174.

(*z*) *Dean v. James*, 4 B. & Ad. 546; 1 N. & M. 393, S. C.

(*a*) *Spybey v. Hide*, 1 Camp. 181, per Lord Ellenborough; *Rivers v. Griffiths*,

contain an averment, that the amount tendered was parcel of a larger sum due upon *one entire contract* (b).

§ 184. So, also, if a party be charged with stealing five horses, he may be convicted of stealing one; or if he be indicted for larceny or robbery, and the property be laid as of the value of twenty shillings, the offence will be complete, though it appear that the article stolen was of less value than any coin of the realm, provided it was of *some* value to the owner (c). There are certain cases, however, in which value is essential to constitute the offence; as where a bankrupt is indicted for concealing property to the amount of ten pounds (d), or a petitioner to a court of bankruptcy is indicted for excepting out of his schedule property of greater value than twenty pounds (e), or a party is charged with stealing in a dwelling-house chattels, &c. to the amount of five pounds (f), or with stealing, or maliciously destroying, or damaging trees in a park above the value of one pound (g). In such cases as these, the evidence must so far correspond with the allegation as to shew that the statutable offence has been committed: that is, the property embezzled, stolen, or destroyed, must be proved, as well as alleged, to be of the requisite value; but if this be done, the exact amount specified in the indictment need not be proved. In the case of *R. v. Forsyth* (h), where a bankrupt was indicted for concealing his property, the indictment, after enumerating many articles, without stating their separate value, added, "one hundred other articles of furniture and a certain debt due from J. T. to the prisoner, to the value of twenty pounds and upwards" (i): the judges held that this indictment was bad, as the

5 B. & A. 630; 1 D. & R. 615, S.C.; *Brandon v. Newington*, 3 Q. B. 915, overruling *Tyler v. Bland*, 9 M. & W. 338; *Hesketh v. Fawcett*, 11 M. & W. 356.

(b) *Cotton v. Godwin*, 7 M. & W. 147; *Hesketh v. Fawcett*, 11 M. & W. 356.

(c) *R. v. Morris*, 9 C. & P. 347, per Parke, B.; *R. v. Bingley*, 5 C. & P. 602, per Gurney, B.; *R. v. Clark*, R. & R. 181. The fact of the article being in the possession of the prosecutor, is, in general, evidence that it was of value to him. *Id.*

(d) Under 5 & 6 Vict. c. 122, § 32.

(e) Under 7 & 8 Vict. c. 96, § 39.

(f) Under 7 & 8 Geo. 4, c. 29, § 12, Eng., and 9 Geo. 4, c. 55, § 12, Ir., amended as to punishment by 2 & 3 Will. 4, c. 62, and 7 Will. 4 & 1 Vict. c. 90, § 1.

(g) 7 & 8 Geo. 4, c. 29, § 38, and 7 & 8 Geo. 4, c. 30, § 19. (h) *R. & R.* 274.

(i) This case was decided under the repealed act of 5 Geo. 2, c. 30, § 1.

property concealed was not all specified, and no distinct value was put upon the articles enumerated. It would seem to follow from this case, that where value, being material, is ascribed to several articles *collectively*, the offence must be made out as to each of those articles.

§ 185. In an indictment against a clerk or servant for embezzlement, unless the offence shall relate to any chattel, or, in a like indictment against a person employed in her Majesty's public service, if the offence relate to any money or valuable security, it is sufficient to allege that money was embezzled, without specifying any particular coin or valuable security; and such allegation may be supported by equally loose evidence (*i*), and, it seems, even by proof of a general deficiency of money that ought to be forthcoming, without shewing from what persons the money was received, or of what coins it consisted, or that any particular sum was received, and not accounted for by the prisoner (*j*). In indictments for stealing, or maliciously destroying, or injuring records, &c., or for stealing, or fraudulently destroying, or concealing wills, or for stealing title deeds, it is unnecessary to allege or prove that the thing stolen was of any value (*k*).

§ 186. It is seldom necessary to prove with precision allegations of *quality*; or, in other words, those allegations which describe the mode in which certain acts have been done. Thus, in an indictment for homicide, the substance of the charge is, that the prisoner killed the deceased by means of shooting, poisoning, cutting, blows and bruises, or the like; it is therefore sufficient, if the proof agree with the allegation in its general character, without precise conformity in every particular. If the charge be of a felonious assault with a staff, and the proof be of such an assault with a stone; or if a wound, alleged to have been given with a sword, be proved to be inflicted by an axe; or if a pistol be

(*i*) 7 & 8 Geo. 4, c. 29, § 48, as to clerks and servants; 2 Will. 4, c. 4, § 3, as to public servants.

(*j*) *R. v. Grove*, 7 C. & P. 635; 1 Moo. C. C. 447, S.C., per eight judges, including the three Chiefs, against the remaining seven.

(*k*) 7 & 8 Geo. 4, c. 29, §§ 21, 22, 23.

stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive material (*k*); or if the death, averred to have been caused by one kind of poison, be shown to have been occasioned by another—the charge is substantially proved, and there is no variance (*l*). Indeed, in this last case, it has been held sufficient to prove that the deceased died of some kind of poison, though the jury were not satisfied as to what the poison really was (*m*). So, where a count alleged that an infant was suffocated, by the mother having placed her hand over its mouth, and the jury found that the death was effected by suffocation, but they could not tell in what particular way, Lord Denman held that the count was proved (*n*). Still, it is necessary to prove substantially the same kind of killing as that alleged; and, therefore, where the indictment averred that the prisoner struck and beat the deceased upon the head, and thereby gave him divers mortal blows, the judges held that this allegation was not supported by proof that the deceased was knocked down by a blow on the head, and in falling on the ground, received a mortal wound (*o*). If the death be caused by one or more wounds or bruises, it seems that the indictment should specify on what part of the body they were inflicted (*p*); and formerly, it was also, in general, deemed necessary to state the particular nature of the injuries—such as their depth, length, or breadth (*q*); but of late years, the judges have held, consistently with common sense, that these last niceties may be safely disregarded (*r*). Indeed, ever since the time of Lord Hale, the charge has been deemed maintainable, though it has appeared on the evidence that the wound

(*k*) *R. v. Oxford*, 9 C. & P. 525, 548. See *R. v. Hughes*, 5 C. & P. 126, the marginal note of which is calculated to mislead.

(*l*) 1 East, P. C. 341; *R. v. Martin*, 5 C. & P. 128, per Parke, B.; 1 Russ. C. & M. 557.

(*m*) *R. v. McConkey*, Ir. Cir. R. 77, per Torrens, J.

(*n*) *R. v. Waters*, 7 C. & P. 250; 1 Moo. C. C. 457, S. C. See also *R. v. Culkin*, 5 C. & P. 121.

(*o*) *R. v. Thompson*, 1 Moo. C. C. 139; 1 Lew. C. C. 193, S. C.; *R. v. Kelly*, 1 Moo. C. C. 113; 1 Lew. C. C. 194, S. C.; *R. v. Martin*, 5 C. & P. 128, per Parke, B.

(*p*) 2 Hale, 185.

(*q*) *Id.* 186.

(*r*) *R. v. Mosley*, 1 Moo. C. C. 97; 1 Lew. C. C. 189, S. C.; *R. v. Tomlinson*, 6 C. & P. 370, per Patteson, J.; *R. v. Turner*, 1 Lew. C. C. 177, per Parke, B.

or bruise really inflicted was different, both in dimensions and situation, from that set out in the indictment (s). In some statutable offences greater precision in the proof is requisite. Thus, by the Acts of 9 Geo. 4, c. 81, § 12, and 7 Will. 4 & 1 Vict. c. 85, §§ 2 and 4, to *stab, cut, or wound* another is made a felony, varying in enormity according as the intent of the prisoner is to murder, maim, disfigure, or disable his victim. Here, as the legislature has employed the words "stab, cut, or wound," in the alternative, the distinction must be attended to, and if the indictment be for stabbing, evidence of cutting will not support the charge (t), though perhaps an allegation of a "wound," which is a more general term, might be sustained by proof of either a cut or stab.

§ 187. The fourth general rule which regulates the law of variance, is, that allegations of matter of *essential description* should be proved as laid. It is impossible to explain with precision the meaning of these words; and the only practical mode of understanding the extent of the rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases. And first, with respect to criminal law, it is now clearly established, that the *name or nature of the property* stolen or damaged is *matter of essential description*; and, that if any material variance is found to exist between the averment of such matter on the record and the proof, the prisoner is entitled to an acquittal. Thus, for example, if the charge be one of firing a stack of hay, and it turns out to have been a stack of wheat; or if a man be accused of stealing a drake, and it is proved to have been a goose, or even a duck, the variance is fatal; for in such cases it may be urged, with possible truth, that the prisoner has been misled by the error in the indictment, and has come prepared to disprove a charge different from that which is sworn against him. A diverting instance of the application of this rule, and one which forcibly illustrates the advantage of allowing

(s) 2 Hale, 186.

(t) R. v. M'Dermot, R. & R. 356. This case was decided on the repealed act of 43 Geo. 3, c. 58, which only used the words "stab or cut."

amendments, occurred a few years back at the assizes for Hertford. A man was charged with stealing "a slop." The theft was clearly proved; but, when called upon for his defence, the prisoner exclaimed, "Why, my lord, it ain't no slop." "You hear what he says," said the judge, addressing the jury. "Is it a slop, gentlemen?" "No, my lord, it's a smock," said one of the jurymen. "Then you must acquit the prisoner." He was acquitted; but the grand jury not being discharged, a second indictment was preferred and found, charging him with stealing "a smock." Nothing daunted, the prisoner now pleaded *auterfois* acquit, and called several witnesses to prove that the article he had stolen was in fact a slop, and this question was submitted to a second jury with much gravity by the learned judge (u). With respect to the description of animals, the stealing of which is made a statutable offence, it would seem to be sufficient to use the general term which includes the whole species, even though the act should employ more specific language. This doctrine has lately been recognised by the judges in a case of sheep stealing. The words of the act (v) on which the indictment was founded, are, any "ram, ewe, sheep, or lamb;" the charge was of killing a sheep, with intent to steal the carcass; the proof was, that a sheep was killed, but the sex could not be discovered. Upon this, the prisoner's counsel contended, that the jury could not presume that the animal was a wether, and that, if it was an ewe, the indictment was bad; but a great majority of the judges, while they admitted that the first proposition was sound law, held that the word "sheep" was a generic term which included equally rams, ewes, and wethers, and the conviction was accordingly confirmed (w). So, an indictment for stealing a sheep will now be supported by evidence of killing a lamb (x). Whether

(u) 28 Law Mag. 12, 13.

(v) 7 & 8 Geo. 4, c. 29, § 25.

(w) *R. v. McCulley*, 2 Moo. C. C. 34; 2 Lew. C. C. 272, S. C.; *R. v. Bannam*, *Crawf. & Dix*, C. C. 147. These cases overrule *R. v. Puddifoot*, 1 Moo. C. C. 247.

(x) *R. v. Spicer*, 1 C. & Kir. 699; 1 Den. C. C. 82, S. C., overruling *R. v. Loom*, 1 Moo. C. C. 160. The decision in *R. v. Loom* was under the repealed act of 15 Geo. 2, c. 34, which, like the act of 7 & 8 Geo. 4, c. 29, § 25, specifies lambs as well as sheep. In an old act of 25 Hen. 8, c. 13, §§ 2, 13, which prohibited persons from having above 2000 sheep, it is expressly enacted, that "lambs under the age of one whole year shall not be adjudged for sheep prohibited by the statute." The special insertion of such a clause leads rather to an inference that, without it, the mention of the grown animal would have included the young. See next note.

a charge of stealing a horse would be sustained by proof of stealing a gelding, a mare, a colt, or a filly (*y*), is by no means clear; though, if the principle be carried out to its legitimate extent, it would seem that no fatal variance would, in such case, arise.

§ 188. *The name of the person injured* is also matter of essential description, and must be proved with a precision which is but little calculated to engender any ardent feelings of respect for the criminal law. Thus, at the late trial of Lord Cardigan in the House of Peers for duelling, the indictment charged his lordship with feloniously shooting "Harvey Garnett Phipps Tuckett," but inasmuch as the counsel for the Crown failed to prove that these specific names belonged to the party wounded, the noble prisoner was acquitted. So, where a married woman was indicted for murdering "an infant male child aged about six weeks and not baptized," the judges held that her conviction could not be sustained, as it appeared in evidence that the child was her own, and had been born in wedlock, and therefore it must necessarily have had the surname of its parents (*z*). If the name of the injured party cannot be ascertained by any reasonable diligence, it will be sufficient to describe him in the indictment as a person "whose name is to the jurors unknown;" but this is a somewhat dangerous form, as, if it should appear at the trial that the party was known, and that his name might consequently have been discovered, the prisoner will be acquitted. Thus, where property was laid in one count as belonging to certain persons named, and in another to persons unknown, and the prosecutor failed to prove the christian name of some of the parties mentioned in the first count, he was not allowed to have recourse to the second count (*a*). So, in a case of child murder, where the deceased, being a bastard child, was described in one count as Harriet Stroud, and in another

(*y*) These are the words used in 7 & 8 Geo. 4, c. 29, § 25. It should be observed that, under the repealed acts of 1 Edw. 6, c. 12, § 10, and 2 & 3 Edw. 6, c. 33, which only mention "horses, geldings, and mares," it was held that proof of stealing a *filly* supported an indictment for stealing a *mare*, *R. v. Welland*, R. & R. 494.

(*z*) *R. v. Biss*, 8 C. & P. 773; 2 Moo. C. C. 93; MS., S. C.

(*a*) *R. v. Robinson*, Holt, N. P. R. 595, per Richards, C. B.; *R. v. Campbell*, 1 C. & Kir. 82.

as a female infant whose name was unknown, and it appeared that the child was christened "Harriet," but there was no evidence of its ever having been called by the name of "Stroud," the judges held that the prisoner could not be convicted on either count (*b*). In Ireland, also, where a woman was indicted for murdering her bastard child, his name being to the jurors unknown, the Court directed an acquittal on proof that the child was two or three months old, and that the mother had once or twice been heard to call him "Johnny" (*c*); though a count similarly framed has been sustained in England, the mother having on one occasion called the child "Mary Ann," and on another "Little Mary." In this last case the child, which was illegitimate, was only twelve days old when it was murdered, and as the mother had called it by two different names, it was impossible to say which (if either) was the right one (*d*). It should be observed that an illegitimate child is not entitled to the surname either of the mother or of the putative father, but can only acquire such name by reputation (*e*), though slight evidence on this head would be sufficient to warrant a jury in finding, that a bastard, mentioned in an indictment by the name of its father or mother, was properly described (*f*). If no evidence can be given that an illegitimate child has acquired a name by reputation, its identity should be fixed in the indictment by showing the name of its mother (*g*).

§ 189. It is not necessary to describe a party by what is, in strictness, his right name; but it will be sufficient to state any name he has assumed (*h*), or by which he is generally known,

(*b*) *R. v. Stroud*, 1 C. & Kir. 187; 2 Moo. C. C. 270, S. C.

(*c*) *R. v. Sweeny*, Ir. Cir. R. 366, per Ball, J. His lordship observed—"It may indeed be a question whether an objection, such as is now made, which goes not to the merits of the case, ought to be allowed to prevail. But sitting here in a judicial, and not in a legislative capacity, I feel it my duty to give the prisoner the benefit of a point, which eminent judges have considered as valid." See *R. v. Walker*, 3 Camp. 264.

(*d*) *R. v. Smith*, 1 Moo. C. C. 402; 6 C. & P. 151, S. C.

(*e*) *R. v. Waters*, 1 Moo. C. C. 457; 7 C. & P. 250, S. C.; *R. v. Clark*, R. & R. 358.

(*f*) *R. v. Evans*, 8 C. & P. 765, per Erskine, J.; *R. v. Sheen*, 2 id. 634, per Burrough, J.

(*g*) *R. v. Hogg*, 2 M. & Rob. 380, per Lord Denman.

(*h*) *R. v. Norton*, R. & R. 510. See *R. v. Williams*, 7 C. & P. 298.

and the omission of a second christian name has been frequently held immaterial (*i*). In Ireland, however, on an indictment for bigamy, in which the second wife was described as Margaret Courtenay, but it appeared that she was baptized and married by the name of Mary Margaret Courtenay, that letters were addressed to her in that form, and that she so signed her name, the variance was held to be fatal, though she was familiarly called Margaret, and went by that name (*j*). The proper mode of describing a peer is by his christian name and rank in the peerage; but it seems that under the degree of a duke, it will be sufficient to confer on him the simple title of "lord" (*k*). It is scarcely necessary to remark, that though a parent and child bear the same name, it will suffice, in an indictment, to describe the latter by that name without the addition of "junior" (*l*).

§ 190. Though it be essential to state the name of the injured party with common accuracy, a mere error in the spelling will not be material, unless it cause a distinct alteration in the sound of the name. Thus, Whyneard and Winyard (*m*), Segrave and Seagrave (*n*), Benedetto and Beniditto (*o*), have been held substantially the same names, while M'Cann and M'Carn (*p*), Tabart and Tarbart (*q*), Shakspeare and Shakepear (*r*), have been deemed fatally variant. In order to obviate the difficulties that would necessarily arise from the application of this rule to cases where joint-stock companies, trustees, or other joint-owners have been injured, several acts of parliament have been passed, which render

(*i*) *Att.-Gen. v. Hawkes*, 1 Tyrwh. 3; *R. v. Berriman*, 5 C. & P. 601; *R. v. —*, 6 id. 408; *Williams v. Bryant*, 5 M. & W. 447. See 2 Russ. C. & M. 795—797.

(*j*) *R. v. M'Anerney*, Ir. Cir. R. 270, per Crampton, J.

(*k*) *R. v. Pitts*, 8 C. & P. 771, where the prosecutor was described as "George Talbot Rice Lord Dynevor," instead of "George Talbot, Baron Dynevor;" *R. v. Elliott*, id. 772, where the words were, "The Right Honourable William Fitzhardinge, Lord Segrave," he being an Earl. It seems that "Edward Bishop of Hereford" is not a sufficient description, id. 771.

(*l*) *R. v. Peace*, 3 B. & A. 579; *R. v. Hodgson*, 1 Lew. C. C. 236, per Parke, B.; *R. v. Bland*, id., per Bolland, B.; *Sweeting v. Fowler*, 1 Stark. R. 106; *R. v. Bayley*, 7 C. & P. 264.

(*m*) *R. v. Foster*, R. & R. 412.

(*n*) *Williams v. Ogle*, 2 Str. 889.

(*o*) *Abitbol v. Beniditto*, 2 Taunt. 401.

(*p*) *R. v. Tannet*, R. & R. 351.

(*q*) *Bingham v. Dickie*, 5 Taunt. 14.

(*r*) *R. v. Shakespeare*, 10 East, 83.

it sufficient in such cases to describe one person only by name, and to state that the offence has been committed against that person, and another or others, according to the circumstances (*s*).

§ 191. Not only must the name of the party injured be accurately given, but the same rule applies to the names of all persons, who, in the description of the offence, are necessarily introduced into the indictment. Thus, where a prisoner was indicted for assaulting a prosecutrix, with the intent that one Peter Coscoran should ravish her, he was held entitled to an acquittal, the christian name of Coscoran not having been proved (*t*) ; and where the indictment charged that a person unknown stole some wheat, and that the prisoner was an accessary before the fact, the judge directed an acquittal, on its appearing that the principal felon had been examined by the grand jury, and had his name written at the back of the bill (*u*). It seems, however, that if the grand jury were to return a separate bill against the principal felon by name, this would not, in itself, be sufficient to invalidate an indictment against an accessary, which charged the principal felony to have been committed by some person or persons unknown (*v*). The name of the prisoner is not a matter of essential description, because on this subject the prosecutor may have no means of obtaining correct information. If, therefore, the prisoner's name or addition be wrongly described, or if the addition be omitted, the Court may correct the error, and call upon the prisoner to plead to the amended indictment (*w*).

(*s*) 7 Geo. 4, c. 64, § 14, enacts, "That in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession of, more than one person, whether such persons be partners in trade, joint tenants, parceners or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be ; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants, parceners or tenants in common, it shall be sufficient to describe them in the manner aforesaid ; and this provision shall be construed to extend to all joint-stock companies and trustees." So the act relating to forgery, 11 Geo. 4 & 1 Will. 4, c. 66, contains a similar provision in § 28. See also 7 Geo. 4, c. 46, § 9.

(*t*) *R. v. Dunmurry*, Ir. Cir. R. 312, per Brady, C. B.

(*u*) *R. v. Walker*, 3 Camp 264, per Le Blanc, J.

(*v*) *R. v. Bush*, R. & R. 372.

(*w*) 7 Geo. 4, c. 64, § 19, enacts, "That no indictment or information shall be

§ 192. The rule which renders it necessary to prove essentially descriptive allegations need not, in this place, be illustrated at any length with respect to civil actions, because the question has already been discussed, while examining the cases that have been decided on the statutes authorising amendments. It may, however, be observed, first, that these statutes will not cure a variance which arises from the misjoinder or nonjoinder of plaintiffs (*x*); and next, that in actions on special contract no variance will arise from omitting part of the consideration for the defendant's promise, unless such consideration be in the nature of a condition precedent (*y*). In the case of *Clark v. Morrell* (*z*), the declaration stated that the plaintiff agreed, *amongst other things*, to manage some chemical works for the defendants, who, in consideration of such agreement, promised to pay him a certain salary; it then contained an averment of mutual promises to perform *the said agreement*, and closed with alleging a breach on the part of the defendants. The agreement, on production, being found to contain stipulations that the plaintiff should not communicate his discoveries to strangers, and should give the defendants the exclusive benefit of his knowledge, as far as their works were concerned, it was objected that there was a variance between the declaration and the agreement, as the former was silent as to these stipulations, which constituted material parts of the consideration for the defendants' promise.

abated by reason of any dilatory plea of misnomer, or want of addition, or of wrong addition of the party offering such plea, if the Court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the Court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded." See *R. v. Orchard*, 8 C. & P. 565, where a woman charged with the murder of her husband, being described as "A. the wife of B. C." the record was amended by inserting the word "widow" instead of "wife," per Lord Abinger.

(*x*) See, as to the law on this subject, the 1st ch. of Chitty on Pl., and, among other cases, *Phelps v. Lyle*, 10 A. & E. 113; *Broadbent v. Ledward*, 11 A. & E. 209; 3 P. & D. 45, S. C.; *Story v. Richardson*, 6 Bing. N. C. 123; *Wallis v. Harrison*, 5 M. & W. 142; *Cocks v. Brewer*, 11 M. & W. 51.

(*y*) As to the distinction between conditions precedent and conditions subsequent, see *Wynne v. Wynne*, 3 M. & Gr. 8; *Richards v. Hayward*, id. 574; *Mathews v. Taylor*, id. 667; *Galloway v. Jackson*, 3 id. 960; *Fishmongers' Co. v. Robertson*, 5 id. 131; 6 Scott, N. R. 58, S. C.; *Brooke v. Spong*, 15 M. & W. 153.

(*z*) 1 M. & Gr. 841; 2 Scott, N. R. 17; 9 Dowl. 461, S. C.

Lord Abinger thereupon amended the record, but the Court of Common Pleas were unanimously of opinion that, although the learned judge had the power of authorising an amendment, yet the exercise of such power was, in fact, unnecessary. Chief-Justice Tindal observed, "The consideration for the defendant's promise is the agreement to which reference is made. The plaintiff does not profess to set out the whole of the agreement. There is no variance unless there is an omission of something of a conditional nature, which, if stated, would require an allegation of performance." And Mr. Justice Coltman added, "If the matters omitted had raised a condition precedent, the omission would have constituted a variance; but the matters, the omission of which is complained of, did not raise any condition precedent. They were not matters which the plaintiff was bound to aver, and, if traversed, to prove, in order to support his action; but would have formed the subject of a cross action, if not performed on the part of the plaintiff" (a). It may further be remarked, that, in actions of assumpsit, if any part of the contract proved should vary materially from what is alleged in the pleadings, the variance will be fatal. Thus, where a declaration stated a specific contract for the sale of a dwelling-house and fixtures, for the residue of a term of years, to commence from a given day, and, to satisfy this allegation, a contract was produced which, on the face of it, showed that it was a sale of a fee-simple, or, at least, left it uncertain what was the interest intended to be conveyed, it was held that the plaintiff must be nonsuited (b). So, in an action against a tenant for not repairing premises demised, where the contract as declared upon was, that the plaintiff should let, and the defendant should take, a farm at a certain rent, the plaintiff undertaking to put the premises in repair within twelve months, and the defendant undertaking to keep them in repair after that time, the Court directed a nonsuit, it appearing on the trial that the agreement contained an additional stipulation, that the plaintiff should keep the buildings insured in 600*l.*, and should rebuild in case of fire (c).

(a) 1 M. & Gr. 851, 852.

(b) *Hughes v. Parker*, 8 M. & W. 244.

(c) *Beech v. White*, 12 A. & E. 668; 4 P. & D. 399, S. C.

CHAPTER II.

OF CONFINING EVIDENCE TO THE POINTS IN ISSUE.

§ 193. THE *second general rule*, which governs the production of testimony, is, that *the evidence must be confined to the points in issue*. This rule is founded upon the consideration that, since these points have been alone selected by the parties in their pleading, as those on which they are mutually willing to rest the fate of the cause (*a*), any evidence in support of other facts which, not being expressly alleged, must be assumed to have no existence, or not being expressly denied, must be admitted to be true, would be obviously improper. Thus, where to an action of assumpsit the defendant pleaded the statute of limitations, to which there was a replication that he did promise within six years, and issue thereon, the plaintiff was not allowed to prove that the action was grounded on a fraudulent receipt of money by the defendant, and that the fraud was first discovered within six years from the commencement of the suit (*b*). So, in an action by the indorsee against the drawer of a bill of exchange, where the plea stated that the defendant had endorsed the bill for a special purpose to one Levy, who, in fraud of that purpose, had handed it to one Hunter, and that Hunter had passed it to the plaintiff *without any good or valuable consideration, and that the plaintiff was not the bonâ fide holder*, the Court held that, on a replication *de injuriâ*, the defendant was not at liberty to show that the plaintiff knew of the fraud; that the pleadings put in issue nothing but the fact of a consideration having been given; that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver *notice* in distinct terms; and that the allegation that the plaintiff was not a bonâ fide holder, was not equivalent to such an averment (*c*). So, a particular allegation of voluntary waste will not let in evidence of permissive waste (*d*); and where, in covenant, the breach assigned

(a) Steph. Pl. 115.

(b) Clark v. Hougham, 2 B. & C. 149.

(c) Uther v. Rich, 10 A. & E. 784.

(d) Martin v. Gilham, 7 A. & E. 540; 2 N. & P. 568, S. C.

was that the defendant had not used the plaintiff's farm in a husbandlike manner, but had committed waste, evidence of bad husbandry, not amounting to waste, was rejected (*e*). Again, in an action of defamation, where the issues raised by the pleas of justification were whether the plaintiff's scholars were ill fed, badly lodged, and covered with vermin, the defendant's counsel was not permitted to put any question to the witnesses, with the view of showing that the boys were also badly educated (*f*); and in another action of the same kind, where the defendant had only pleaded the general issue, Lord Ellenborough would not allow the plaintiff to prove that the assertions contained in the libel were false. "There is no plea of justification on the record," said his Lordship, "and, therefore, I can no more hear a falsification on the one side, than a justification on the other" (*g*).

§ 194. The cases just cited in illustration of this rule have been selected at hazard; but in order to obtain practical information on this important subject, it may be advisable to examine at some length the *new rules of pleading*, together with the leading decisions explanatory of their operation. These rules, which have now been promulgated for fourteen years, and are in consequence pretty generally understood, are intended to effect three material objects; first, to make the plaintiff acquainted with the intended defence, and thus to prevent his being taken by surprise at the trial; secondly, to save the expense of collecting unnecessary evidence; and thirdly, to bring *legal* defences more prominently forward on the face of the record (*h*).

§ 195. Such being the general objects of the new rules, the first rule which requires notice in a work on evidence is, that "in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorised by Act of

(*e*) *Harris v. Mantle*, 3 T. R. 307.

(*f*) *Boldron v. Widdows*, 1 C. & P. 65, per Abbott, C. J.

(*g*) *Stuart v. Lovell*, 2 Stark. R. 94; See also *Cornwall v. Richardson*, Ry. & M. 305, per Abbott, C. J.

(*h*) See *Isaac v. Farrer*, 1 M. & W. 70, per Lord Abinger; 4 Dowl. 755, S. C.; *Barnett v. Glossop*, 1 Bing. N. C. 636, 637, per Park and Bosanquet, Js.; 3 Dowl. 625, S. C.; *Gutsole v. Mathers*, 1 M. & W. 502, 503, per Lord Abinger.

Parliament to sue or be sued as nominal parties, the character, in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied" (i). This rule takes no special notice of an action brought by husband and wife, but by the old law, the plea of the general issue admits the marriage (j).

§ 196. Passing now to pleadings in particular actions, the most practically important question relates to the effect of the plea of *non assumpsit*; and here the new rules have determined, that, "in all actions of assumpsit, except on bills of exchange or promissory notes, this plea shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law" (k). Such being the general rule, it will be convenient to discuss its operation, in regard first to special declarations, and next to the indebitatus counts.

§ 197. In actions, then, of *special assumpsit*, it may be laid down as an established principle of law, that the plea of non assumpsit on the one hand operates as a denial, not only of the defendant's *promise* as alleged in the declaration, but of the *consideration* on which that promise is founded; and on the other, it does not put in issue any matter of *inducement* which forms *no* part of the consideration; neither does it deny the defendant's *breach* of promise, or the plaintiff's consequent *damage*. It will be presently seen that the several branches of this rule are fully supported, both by the direct illustrations afforded by the judges, and by subsequent decisions.

§ 198. The first two illustrations are as follows:—"In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given *upon the alleged consideration*, but not of the *breach*; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the

(i) Reg. Gen. H. T. 4 Will. 4, r. 21; 5 B. & Ad. vii. See *Jones v. Brown*, 1 Bing. N. C. 484; 1 Scott, 453, S. C. (j) B. N. P. 21.

(k) Reg. Gen. H. T. 4 Will. 4, I. Assumpsit; 5 B. & Ad. vii.

alleged compliance with warranties" (l). In accordance with the first example here given, it has been held, that, when to an action on the warranty of a horse, the defendant had pleaded non assumpsit, he could not give evidence to show that the horse was sound at the time of the sale (m). The second illustration has been explained to mean, that the plea of non assumpsit puts in issue, not merely the subscription to a policy, containing the particular terms alleged, but to a policy, *caused to be made by or on behalf of the plaintiff*, and containing those terms; as also the *consideration* for the defendant's promise, as, for instance, the fact that the plaintiff had paid the premium, or had promised to observe on his part the terms and conditions of the policy (n). The examples given by the judges thus proceed:—"In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and *of such bailment or employment* as would raise a promise in law to *the effect alleged*, but not of the *breach*" (o). So, if an action of assumpsit be brought against an attorney for negligence, the fact of his having been retained by the plaintiff as an attorney would seem to be put in issue by the plea of non assumpsit (p); and in a similar action against a carrier for negligence in conveying goods, the defendant may prove, under the general issue, that the goods were received by him on an express condition that the plaintiff should accompany them for the purpose of protection, and that he neglected to do so, in consequence of which the goods were lost; because such evidence, showing that the promise was conditional, goes to negative the unqualified promise alleged in the declaration (q).

(l) Reg. Gen. H. T. 4 Will. 4, I. Assumpsit; 5 B. & Ad. vii.

(m) Smith v. Parsons, 8 C. & P. 199, per Lord Abinger.

(n) Sutherland v. Pratt, 11 M. & W. 296, 314; 2 Dowl. N. S. 813, S. C.; Redmond v. Smith, 7 M. & Gr. 457; 8 Scott, N. R. 250, S. C. In this last case the declaration alleged, that the policy was made by A, as agent for the plaintiff, and on his account, and for his use and benefit. The defendant, intending to rely on the act of 28 Geo. 3, c. 56. §§ 1 & 2, traversed this fact, but the Court held that the plea was bad, as amounting to non assumpsit.

(o) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., I. Assumpsit; 5 B. & Ad. vii.

(p) Aldis v. Gardner, 1 C. & Kir. 564, per Cresswell, J.

(q) Brind v. Dale, 2 M. & W. 775, recognised by Tindal, C. J., in Webb v.

§ 199. The doctrine that the plea of non assumpsit puts in issue the *consideration* as well as the *promise*, is one which cannot now be disputed (*r*); and, consequently, a defendant will be allowed, under such plea, to avail himself of any *material* variance between the consideration for his promise alleged in the declaration, and that proved by the production of the written agreement (*s*). Nay, he may show the absence of any consideration sufficient to sustain his promise, because, by disproving the consideration, he will of course disprove the contract (*t*). Again, if a declaration describes the terms of a contract in language denoting that certain acts, which the plaintiff has engaged to do, are independent of, or concurrent with, the act to be done on the part of the defendant; and then goes on to allege that, although he the plaintiff was ready and willing to perform his part of the agreement, yet the defendant had not done the act he had engaged to do; this latter, under the plea of non assumpsit, may, it seems, show that the acts to be done by the plaintiff were in the nature of conditions precedent, and had not been performed; for, by giving such evidence, the agreement will appear to be a conditional agreement, and not the absolute agreement declared upon (*u*).

§ 200. In actions of *indebitatus assumpsit*, the general issue denies every fact from which a promise to pay *on request* can be implied by law; but it does not deny the *breach* of such promise. The judges have thus illustrated this rule:—"In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate

Page, 6 M. & Gr. 202. See also *Nash v. Breeze*, 11 M. & W. 352; and *Whitaker v. Mason*, 2 Bing. N. C. 359; 2 Scott, 567, S. C.; *Wade v. Simeon*, 2 Com. B. 548, 561.

(*r*) *Redmond v. Smith*, 8 Scott, N. R. 256, per Tindal, C. J.; 7 M. & Gr. 472, S. C.

(*s*) *Beech v. White*, 12 A. & E. 668; 4 P. & D. 399, S. C. cited ante, § 192.

(*t*) *Brydges v. Lewis*, 3 Q. B. 603, 608; *Raikes v. Todd*, 8 A. & E. 854, per Lord Denman. The case of *Passenger v. Brookes*, as reported in 1 Bing. N. C. 587, is now overruled, though the fuller report given in 1 Scott, 560, may be sustained. See *Bennion v. Davison*, 3 M. & W. 183, per Parke, B.; and *Nash v. Breeze*, 11 M. & W. 355, per id.

(*u*) *Kemble v. Mills*, 1 M. & Gr. 757, 770, 771, per Maule, J.; 2 Scott, N. R. 121, S. C.

as a denial both of receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff" (v). In addition to these examples, which, it must be confessed, are somewhat meagre, it may be observed, that, whenever the defendant can show that in fact no *debt* ever existed before action brought, he may do so under the plea of the general issue. For instance, if the action be for *goods sold and delivered*, he may defend himself under this plea, by proving that they were paid for by ready money (w); that they were sold on credit, which was unexpired when the action was commenced (x); that they were sold under a condition, that if they did not answer their purpose, nothing should be paid for them, and that in fact they did not answer their purpose (y); that they were sold under any special agreement, which has not been performed (z); that they were delivered under a contract of barter (a); or that they turned out to be *utterly* useless (b). Under this plea he may show in reduction of damages, that the goods supplied were of less value than was prescribed by the contract (c). So, the defendant will succeed under the general issue, if the action be brought for goods sold and delivered, and the contract prove to be one for the supply of materials, to be used by the plaintiff in the construction of a building or other fixture for the defendant; for in such case, the proper mode of declaring will be on a count, either for work, labour, and materials, or for erecting and constructing the building or fixture (d). But the defendant cannot, under non assumpsit, show either generally, that at the time of the sale the goods did

(v) Reg. Gen. H. T. 4 Will. 4, I. Assumpsit; 5 B. & Ad. vii. viii.

(w) Bussey v. Barnett, 9 M. & W. 312. But see Littlechild v. Banks, 7 Q. B. 739.

(x) Broomfield v. Smith, 1 M. & W. 542, overruling Edmonds v. Harris, 2 A. & E. 414; 4 N. & M. 182, S. C.

(y) Grounsell v. Lamb, 1 M. & W. 352.

(z) Broomfield v. Smith, 1 M. & W. 543, per Lord Abinger; Garey v. Pyke, 10 A. & E. 512; 2 P. & D. 427, S. C.; Hayselden v. Staff, 5 A. & E. 153; 6 N. & M. 659, S. C.

(a) Harrison v. Luke, 14 M. & W. 139.

(b) Cousins v. Paddon, 2 C. M. & R. 547; 4 Dowl. 488; 5 Tyrw. 535, S. C. recognised by Lord Denman in Hayselden v. Staff, 5 A. & E. 162; Baillie v. Kell, 4 Bing. N. C. 638; 6 Scott, 379, S. C.; Chapel v. Hickes, 2 C. & Mee. 214; Allen v. Cameron, 3 Tyrw. 907. These cases overrule Roffey v. Smith, 6 C. & P. 662.

(c) Cases cited in last note.

(d) Clark v. Bulmer, 11 M. & W. 243; Cotterell v. Apsey, 6 Taunt. 322; Tripp v. Armitage, 4 M. & W. 687. See Parsons v. Saxter, 2 C. & Kir. 266.

not belong to the vendor, or specially, that he was not entitled to them at that time, and that afterwards they were reclaimed by the real owner (*d*). In an action for *goods bargained and sold*, a defence that they were sold under a special contract, that they should be shipped within the current month, and landed in London within a given time, which conditions were not performed, is admissible under the general issue (*e*).

§ 201. In an action for *work and labour*, it may be shown, under non assumpsit, that the work was done so negligently and unskillfully as to be valueless (*f*); or that it was done under an agreement that the plaintiff should claim no remuneration, except for disbursements (*g*); or under a contract, which has been broken by the plaintiff (*h*); or under some special contract, which did not entitle the plaintiff to maintain an action of indebitatus assumpsit (*i*); or that part of the work was done, or part of the materials was supplied by the defendant, and that the value of such part amounted to so much of the plaintiff's claim as was not covered by the other pleas (*j*). In the cases which established this last proposition, it was contended that the defendant should have pleaded a set-off, but the Courts of Common Pleas and Exchequer respectively held, that the amount of the work done, and materials supplied by him, was not a matter of set-off, but of deduction.

§ 202. If the plaintiff declare on a count for *money had and received*, the defendant, under the general issue, may prove any facts, which show that the money was not received to the sole use of the plaintiff; as, for example, that it was the proceeds of goods

(*d*) *Walker v. Mellon*, 2 C. & Kir. 346. In *Allen v. Hopkins*, 13 M. & W. 94, this last defence was specially pleaded.

(*e*) *Gardner v. Alexander*, 3 Dowl. 146; 1 Scott, 281, S. C.; *Hayselden v. Staff*, 5 A. & E. 161, 162. See *Sieveling v. Dutton*, 4 Dowl. & L. 197.

(*f*) *Bracey v. Carter*, 12 A. & E. 373; *Hill v. Allen*, 2 M. & W. 283. These were actions brought by attornies.

(*g*) *Jones v. Nanney*, 1 M. & W. 333.

(*h*) *Kewley v. Stokes*, 2 C. & Kir. 435, per Erle, J. The plaintiff under this common count cannot prove that the breach of the contract arose from the defendant's default, *id*.

(*i*) *Cleworth v. Pickford*, 7 M. & W. 314, 320, 321, per Lord Abinger; *Collingbourne v. Mantell*, 5 M. & W. 289.

(*j*) *Turner v. Diaper*, 2 M. & Gr. 241; 2 Scott, N. R. 447, S. C.; *Newton v. Forster*, 12 M. & W. 772.

pledged to the defendant, with a power of sale, by persons who, being joint-owners with the plaintiff, were allowed by him to hold the goods as their own, and to whom the defendant had made advances equal to the value of the goods (*j*). In actions for *money lent or paid*, the defendant, under the general issue, may prove that the loan or payment was made under such circumstances as to raise no implied promise of repayment (*k*), or that the parties entered into a contract *inconsistent* with the *indebitatus* contract declared on; as, for instance, a contract that the plaintiff should lend money to the defendant, or pay money for him, in consideration of the defendant endorsing a bill to him, or depositing with him bonds and other securities, with a power to sell them and reimburse himself, which conditions were performed by the defendant (*l*). If the action be upon an *account stated*, the defendant may show, under non assumpsit, that the account was *in fact incorrect*, even though he has previously admitted its correctness; because the issue is not simply whether there was an account stated or not, but whether the defendant was or was not *indebted* on such account stated (*m*). It seems, however, that he cannot rely on a *subsequent* account stated, in which the balance was found to be in his favour, because, in law, the second account will be regarded either as a payment or as a set-off: and in either event must be specially pleaded (*n*).

§ 203. Again, on the common count for *use and occupation*, the defence that the premises were held under a demise at a rent payable quarterly, and that *before* the rent became due, either the plaintiff (*o*), or his superior landlord (*p*), evicted the defendant, or the former accepted a surrender of the term from him, or that a mortgagee of the premises gave notice to the defendant, *before* the rent was due, to pay it to him, may be given in evidence under

(*j*) *Solly v. Neish*, 2 C. M. & R. 355; 5 Tyr. 625; 4 Dowl. 248, S.C., recognised in *Hayseiden v. Staff*, 5 A. & E. 161. See also *Wainwright v. Clement*, 4 M. & W. 396, per Parke, B.; *Clark v. Dignam*, 3 M. & W. 478.

(*k*) *Worrall v. Grayson*, 1 M. & W. 166; *Gregory v. Hartnoll*, id. 183.

(*l*) *Morgan v. Pebrer*, 3 Bing. N. C. 457; 4 Scott, 230, S. C.; *Maude v. Nesham*, 3 M. & W. 502. (*m*) *Thomas v. Hawkes*, 8 M. & W. 140.

(*n*) *Fidgett v. Penny*, 1 C. M. & R. 108; 4 Tyr. 660; 2 Dowl. 714, S. C.

(*o*) *Prentice v. Elliott*, 5 M. & W. 606; *Dodd v. Ackiom*, 6 M. & Gr. 672.

(*p*) *Selby v. Browne*, 7 Q. B. 620.

the general issue (*p*); though, in this last case, if the mortgagee's claim had been made *after* the rent had accrued, and the plaintiff's right of action had consequently *vested*, the defence must have been pleaded in confession and avoidance (*q*). So, in a similar action, it seems that the defendant may show, under the plea of non assumpsit, that the premises were uninhabitable (*r*), when such a defence is a bar to the action (*s*); or that he was let into possession by the plaintiff, under a contract to purchase, which contained no stipulation as to the terms of occupancy, and which afterwards went off in consequence of the plaintiff's inability to make out a good title (*t*); or, in short, the defendant may give in evidence any other fact, which proves that he never so occupied the premises as to render him liable, in point of law, to the payment of rent (*u*).

§ 204. Under the plea of non assumpsit, the defendant may always, whether the plaintiff has declared on a special or indebitatus count, show that the demand sought to be enforced in the action arose out of a contract by *specialty*; though, where, on a loan, any mortgage or other deed has been taken by way of *collateral* security, and such deed contains *no covenant* to repay the sum advanced, an action for money lent, either in assumpsit or debt, may well be supported (*v*). If there has been an original independent simple contract, which is merged in a deed, it would probably be deemed necessary to plead the deed (*w*). Again, under the general issue, the defendant may always show, that the actual agreement between the parties was materially different from that declared upon (*x*).

(*p*) *Waddilove v. Barnett*, 2 Bing. N. C. 538; 2 Scott, 763; 4 Dowl. 347, S. C., recognised in *Hayelden v. Staff*, 5 A. & E. 159. (*q*) *Id.*

(*r*) *Smith v. Marrable*, 11 M. & W. 5, 8, 9, per Parke, B.

(*s*) See same case, and compare it with *Sutton v. Temple*, 12 M. & W. 52; and *Hart v. Windsor*, *id.* 68.

(*t*) *Winterbottom v. Ingham*, 7 Q. B. 611. See *Hall v. Vaughan*, 6 Price, 157; *Hearn v. Tomlin*, Pea. R. 192, per Lord Kenyon; *Howard v. Shaw*, 8 M. & W. 118; *Kirtland v. Pounsett*, 2 Taunt. 145.

(*u*) *Smith v. Marrable*, 11 M. & W. 8, 9, per Parke, B.

(*v*) *Yates v. Aston*, 4 Q. B. 182.

(*w*) *Edwards v. Bates*, 7 M. & Gr. 590, 601; *Filmer v. Burnby*, 2 M. & Gr. 529; 2 Scott, N. R. 689, S. C. See also *Yates v. Aston*, 4 Q. B. 182.

(*x*) *Williams v. Vines*, 6 Q. B. 355; *Nash v. Breeze*, 11 M. & W. 352; *Heath v. Durant*, 12 M. & W. 438; 1 Dowl. & L. 571, S. C.; *Sharland v. Leifchild*, 11 Jurist, 523.

§ 205. "In every species of *assumpsit*, all *matters in confession or avoidance*, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: *Ex. gr.*, Infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, endorsing, accepting, &c., bills or notes by way of accommodation, set-off (*x*), mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded" (*y*). In interpreting this rule, so far as it relates to *illegality*, it matters not whether the illegality arises on a statute, or at common law (*z*); nor whether the express contract on which the plaintiff sues is illegal, or the facts which constitute the consideration are so, and therefore no contract to pay for them can be implied (*a*); but, in all cases alike, the defendant, if he wishes to rely on the illegality of the transaction, must plead it specially as a defence; and unless he does so, he can raise no objection, even though the illegality appear completely by the plaintiff's own evidence (*b*). Thus, where the plaintiff brought an action for goods sold and delivered, and, in making out his case, proved that the goods were fireworks, which by the old act of 9 & 10 Will. 3, c. 7, § 1, could not be legally sold, the Court held that he was entitled to a verdict, the defendant having merely pleaded the general issue (*c*). With respect to the plea of the *Statute of Limitations*, the defendant may prove under it, that, although the original writ issued within six years after the cause of action accrued, it is not available to prevent the operation of the statute, inasmuch as it has not been continued pursuant to the Uniformity of Process Act (*d*); because, *for this purpose*, the last writ which is served is the commencement of the

(*x*) See *Graham v. Partridge*, 1 M. & W. 395; *Tyr. & Gr.* 754; 5 Dowl. 108, S. C.

(*y*) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., I. *Assumpsit*; 5 B. & Ad. viii.

(*z*) *Potts v. Sparrow*, 1 Bing. N. C. 596, per Park, J.

(*a*) *Potts v. Sparrow*, 1 Bing. N. C. 594; 3 Dowl. 630; 1 Scott, 578, S. C.; *Martin v. Smith*, 4 Bing. N. C. 436; 6 Scott, 261, S. C.; *Clutterbuck v. Coffin*, 3 M. & Gr. 845, 848; 4 Scott, N. R. 509; 1 Dowl. N. S. 479, S. C.; *Icely v. Grew*, 6 C. & P. 671, per Lord Denman; *Woodhouse v. Swift*, 7 C. & P. 310, per Alderson, B.

(*b*) *Fenwick v. Laycock*, 1 Q. B. 416; 1 G. & D. 27, S. C., recognised by Parke, B., in *Daintree v. Hutchinson*, 10 M. & W. 92.

(*c*) *Id.*

(*d*) 2 Will. 4, c. 39, § 10.

suit (e). The word "*coverture*" in the rule is somewhat ambiguous, since a question may arise, first, as to whether it applies to the coverture of the plaintiff as well as to that of the defendant; and next, supposing that it does, whether it points only to a marriage after the contract, or extends also to a marriage existing at the time of the contract, when, in point of law, there would be either no contract at all, or a contract between the husband and the defendant (f).

§ 206. Though, under the above rule, the fact of *payment*, when relied on as a bar to the action, must have been specially pleaded, it was still a doubtful point how far this fact was admissible under the general issue with a view of reducing the damages (g), and consequently it became necessary to promulgate a further rule on the subject, which orders, that "payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar" (h). These words seem sufficiently plain and comprehensive, but an attempt was made in a late case to avoid their authority. The action was on a bill of exchange for 40*l.*, and the defendant paid into court 4*l.* 18*s.*, denying damages ultra. At the trial it appeared that the amount paid into court was too little by one year's interest; whereupon the defendant tendered evidence of the payment of the bill some years before, for the purpose of showing that the jury ought not to give damages in respect of the interest, as no principal sum bearing interest was in fact due during the year for which interest was claimed. The Court, however, notwithstanding an argument that the interest, being merely damages, could not be pleaded to, held that the evidence was inadmissible (i).

§ 207. If, indeed, "the plaintiff (in order to avoid the expense of a plea of payment) shall have *given credit in the particulars* of his demand for any sum or sums of money therein admitted to

(e) *Pratt v. Hawkins*, 15 M. & W. 399.

(f) *Moss v. Smith*, 1 M. & Gr. 232, and n. (a).

(g) See *Shirley v. Jacobs*, 4 Dowl. 136; 2 Bing. N. C. 88; 2 Scott, 157, S.C.; *Lediard v. Boucher*, 7 C. & P. 1; *Richardson v. Robertson*, 1 M. & W. 463; *Belbin v. Butt*, 2 id. 422.

(h) Reg. Gen. T. T. 1 Vict., 8 A. & E. 280, and 4 M. & W. 4.

(i) *Adams v. Palk*, 3 Q. B. 2.

have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule will not apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums" (*j*). This last rule, which set at rest one question that had divided the Courts in Westminster Hall (*k*), has raised others, that have not been unproductive of litigation; but at length the following points seem pretty clearly established;—*First*, the rule does not extend to set-off, and consequently, though the plaintiff's particulars admit specific counter-claims on the part of the defendant, and show that the plaintiff seeks to recover only a balance, the defendant must still plead the set-off, or otherwise the plaintiff will be entitled to a verdict, if he proves a sum due to him to any amount (*l*). In cases, too, where a plea of set-off has been placed on the record, the defendant must support such plea by independent proof, for if he relies on the particulars as containing an admission, he must put them in as his own evidence, and the plaintiff will then be entitled to have the entire document submitted to the jury, as evidence of the total amount of claims on both sides (*m*). *Secondly*, if the plaintiff, either by his declaration, or by his bill of particulars, admits a specific payment on account of his whole original demand, and goes only for a balance, he cannot recover, under the general issue, without proving damages or a debt exceeding the amount admitted; because the matter put in issue is the existence of a *balance*, after deducting the sum for which credit is given. The sole effect of the rule is to render it unnecessary for the defendant to plead and prove payment of the sums so admitted to have been received (*n*). *Thirdly*, where the bill of particulars gives credit for the payment of particular sums, the Court will not scrutinise very nicely the form of the bill; but while, on the one hand, it will assume, as against the plaintiff,

(*j*) Reg. Gen. T. T. 1 Vict., 8 A. & E. 280.

(*k*) See *Ernest v. Brown*, 3 Bing. N.C. 674; *Kenyon v. Wakes*, 2 M. & W. 764; *Nicholl v. Williams*, id. 758; *Coates v. Stevens*, 2 C. M. & R. 118; *Ferguson v. Mahon*, 9 A. & E. 245.

(*l*) *Townson v. Jackson*, 13 M. & W. 374; *Morris v. Jones*, 1 Q. B. 397; 1 G. & D. 13, S.C.; *Rowland v. Blaksley*, 1 Q. B. 403.

(*m*) *Rowland v. Blaksley*, 1 Q. B. 403.

(*n*) *Price v. Rees*, 11 M. & W. 576; *Smethurst v. Taylor*, 12 M. & W. 545.

that the sums admitted to have been paid generally, were paid *by the defendant* (*o*), it will also, on the other hand, allow the plaintiff to show, that certain counter-claims, as, for instance, the value of an article returned by the defendant, was treated in the particulars as money *paid* (*p*). *Fourthly*, where the particulars admit a specific sum to have been paid, a plea of payment will be considered as being pleaded to the balance only, although some of the items for which credit is given in the particulars were paid after action brought (*q*); and, consequently, such plea will, in general, not be allowed, unless the defendant will undertake to prove some payment not covered by the admission (*r*). If, however, the particulars claim a balance generally, after giving credit for all payments on account, the plaintiff will recover on proving a claim to any amount, unless the defendant pleads payment, and under that plea shows that the claim so proved has been liquidated (*s*). In *Green v. Smithies* (*t*), which was an action for goods sold and delivered, the bill of particulars, while it credited the defendant for a bill of exchange indorsed by him to the plaintiff, debited him to the amount of the bill for its dishonour, and the Court held that the defendant could not show, under non assumpsit, that the plaintiff, after taking and presenting the bill, failed to give notice of dishonour; for the case was the same as if the bill had not been mentioned at all in the particulars, the two items destroying each other. *Fifthly*, if the plaintiff demands a balance, without stating how it arises, and the defendant pleads either payment or set-off, the jury must determine whether or not, in the account exhibiting such balance, credit has already been given for the sums covered by the pleas (*u*).

§ 208. Before leaving the subject of payment, it may be expedient to observe, that if a plaintiff, seeking to recover a sum of money, declares in a general form, the defendant, by proving, under

(*o*) *Smethurst v. Taylor*, 12 M. & W. 545.

(*p*) *Lamb v. Micklethwait*, 1 Q. B. 400; 1 G. & D. 136, S.C.; *Rowland v. Blaksley*, 1 Q. B. 406, per Patteson, J., and 407, per Lord Denman.

(*q*) *Eastwick v. Harman*, 6 M. & W. 13.

(*r*) *Morris v. Jones*, 1 Q. B. 399, per Patteson, J.

(*s*) *Morris v. Jones*, 1 Q. B. 397; 1 G. & D. 13, S.C. (*t*) 1 Q. B. 796.

(*u*) *Lamb v. Micklethwait*, 1 Q. B. 400; 1 G. & D. 136, S.C.; *Townson v. Jackson*, 13 M. & W. 374.

a general plea of payment, that a sum equal to the amount specified in the declaration has been liquidated, will not be entitled to a verdict, if the plaintiff can show that, on the entire account, a balance is still due to him; and this too, whether or not it appears by the particulars that the plaintiff is going for a balance. For instance, where a declaration on a guarantee by defendant for goods to be supplied to A. B., claimed 78*l.* as the value of goods so supplied; and the defendant pleaded that A. B. had paid the sum mentioned in the declaration, which fact was traversed by the replication; the Court held that, after proof by defendant that A. B. had paid 78*l.*, the plaintiff, without having new assigned, might give evidence of a balance unpaid beyond that sum (*v*). So, where a plaintiff declared in debt for 100*l.* for work and labour, and on an account stated, and the defendant pleaded payment of 100*l.* in satisfaction of the causes of action mentioned in the declaration, the plaintiff was allowed to prove that 96*l.* was due to him for the balance of his account, after giving credit for the 100*l.* he had received; and it was held that the plea was not proved, and that no new assignment was necessary (*w*). Under a general plea of payment the defendant is bound to prove that he has paid whatever demand the plaintiff can establish, in the same manner as a plea of leave and licence in trespass will bind him to show a licence co-extensive with all the trespasses which the plaintiff may prove (*x*). If, however, while the declaration points at one particular transaction, the plea distinctly applies itself to another, or if the plea narrows the declaration contrary to the intention of the plaintiff, a new assignment will be necessary, according to the rule laid down in *Rogers v. Custance* (*y*). There, the declaration was general, for work and labour; the plea set out that the work was done under a special contract, as to which differences had arisen, and that ultimately it was agreed that a certain sum should be paid by the defendant, which had been paid. The replication took

(*v*) *Moses v. Levy*, 4 Q. B. 213.

(*w*) *James v. Lingham*, 5 Bing. N. C. 553; 7 Scott, 603, S. C.; *Kenningham v. Alison*, 2 Dowl. N. S. 658; *Freeman v. Crafts*, 4 M. & W. 4. See also *Alston v. Mills*, 9 A. & E. 248, recognised by Lord Abinger in *Price v. Rees*, 11 M. & W. 580.

(*x*) *Moses v. Levy*, 4 Q. B. 218, per Lord Denman. See *Barnes v. Hunt*, 11 East, 451; *Bowen v. Jenkin*, 6 A. & E. 911, 919.

(*y*) 1 Q. B. 77; explained in *Moses v. Levy*, 4 Q. B. 217, 218.

issue on the payment. The plaintiff sought to give evidence of extra work dehors the contract; but the Court held that he was not at liberty to do so without new assigning, inasmuch as the plea had narrowed the cause of action, and the plaintiff by his replication had adopted that narrow view of it.

§ 209. It seems that the *lunacy* of a defendant, when he entered into the indebitatus contract declared on, may be given in evidence under the general issue (*z*); though it has been held more than once, in actions on negotiable paper, that the defendant could not prove his insanity or intoxication, under a plea denying that he made the note, or indorsed the bill declared on, but that these defences must be embodied in special pleas (*a*). A defendant cannot set up, under the plea of non assumpsit, that the written agreement, which forms the subject-matter of the action, has, subsequently to its execution by him, been *altered* in a material manner; at least if the plaintiff has declared on the agreement in its original form; because the defendant, in raising such a defence, confesses that he made the contract, but avoids it by showing that it was afterwards rendered nugatory by the alteration (*b*). In an action brought by an attorney or solicitor for his costs, or by the executor, administrator, or assignee of such person, the plaintiff need not prove that the bill has been delivered more than a month before the commencement of the suit, unless that fact be denied by a special plea (*c*).

(*z*) *Clarke v. Dangerfield*, Pears. Chit. Pl. 228. See *Tarbutck v. Bispham*, 2 M. & W. 2.

(*a*) *Gore v. Gibson*, 13 M. & W. 623; *Harrison v. Richardson*, 1 M. & Rob. 504, per Lord Abinger.

(*b*) *Hemming v. Trenery*, 9 A. & E. 926, 935; 1 P. & D. 661, S. C.; *Davidson v. Cooper*, 11 M. & W. 778. These cases were recognised by Parke, B., in *Parry v. Nicholson*, 13 M. & W. 780. See post, § 213, where this matter is again noticed.

(*c*) *Beck v. Mordant*, 2 Bing. N. C. 140; 4 Dowl. 112, S. C.; *Robinson v. Rowland*, 4 Dowl. 271; *Lane v. Glenny*, 7 A. & E. 83; 2 N. & P. 258, S. C.; *Hill v. Sydney*, 7 A. & E. 956; *Moore v. Dent*, 1 M. & Rob. 462, per Parke, B. These cases were decided on the act of 2 Geo. 2, c. 23, which is now repealed by 6 & 7 Vict. c. 73; but they equally apply to the 37th sect. of this last act, which enacts that "no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the

§ 210. As the meaning of this part of the rule under review is to require those matters alone to be specially pleaded, which would have been the subject of proof *on the part of the defendant*, such, for instance, as fraud, usury, gaming, infancy, coverture and the like, it does not exempt the plaintiff from proving anything which he would formerly have been required to prove (d); and consequently he must still, under the general issue, whether in assumpsit, debt, or case, show a compliance with the requisites of the statute of frauds (e), or Lord Tenterden's

expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for, him at his counting-house, office of business, dwelling-house or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or in the case of a partnership, by any of the partners, either with his own name, or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in, or accompanied by, a letter subscribed in like manner referring to such bill. * * * Provided also, that it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, and disbursements, subscribed in the manner aforesaid, or inclosed in, or accompanied by, such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but nevertheless, it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a *bonâ fide* compliance with this act: provided also, that it shall be lawful for any judge of the superior courts of law or equity to authorise an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements, against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England." In construing this section it has been held, that an unsigned bill of costs which does not on its face charge any one, if accompanied by a letter duly signed by the attorney, referring to the bill, and charging the defendant with the amount, is a sufficient delivery. *Taylor v. Hodgson*, 14 Law J. N. S., Bail Court, 310.

(d) Per Parke, B., in *Buttmere v. Hayes*, 5 M. & W. 461, and in *Leaf v. Tuton*, 10 M. & W. 397, 398.

(e) *Eastwood v. Kenyon*, 11 A. & E. 438; 2 P. & D. 276, S. C.; *Buttmere v. Hayes*, 5 M. & W. 456. These were decisions in assumpsit on § 4 of 29 Car. 2, c. 3. *Leaf v. Tuton*, 10 M. & W. 393; *Johnson v. Hodgson*, 2 M. & W. 653, 657, per Lord Abinger; *Elliott v. Thomas*, 3 M. & W. 170, 173, n. (a); assumpsit on § 17 of same act. *Fricker v. Thomlinson*, 1 M. & Gr. 772, debt on same section. These cases overrule *Maggs v. Ames*, 4 Bing. 470; 1 M. & P. 294, S. C., and

Act (*f*), or other acts, which provide that the subject-matter of certain contracts should be reduced to writing. So, an apothecary who brings an action for his medicine and attendance, must prove, under the general issue, his right or qualification to practise, pursuant to the acts of 55 Geo. 3, c. 194, § 21, and 6 Geo. 4, c. 133, §§ 4 & 5, because by the express language of § 21 of the former act, he cannot recover his charges, *unless he shall prove on the trial that he was duly qualified (g)*. But if a statute were simply to enact that a plaintiff *should not recover*, unless twenty-one days' notice of action were given, or unless the venue were laid in a certain county, the defendant could not object that no sufficient notice had been given, or that the venue was wrongly laid, without pleading such defect as a defence to the action (*h*). Again, the objection that an instrument is not stamped, or is insufficiently stamped, may be raised under the general issue; or in the case of a bill of exchange, a promissory note, or a post-dated cheque, under a plea denying that the defendant either accepted, or drew, or indorsed the bill, or made the note or cheque, as alleged in the declaration (*i*).

§ 211. There is also no doubt that the defendant, without a

Barnett v. Glossop, 1 Bing. N. C. 633; 1 Scott, 621, S. C. In Buttemere v. Hayes, 5 M. & W. 461, 462, Parke, B., observes, "We have no difficulty in saying, that, in the other cases in which the Statute of Frauds requires a writing; as, for instance, in cases of demises for three years, a writing must be proved, not merely on a special traverse of the demise, but where the denial of a demise is included in the general issue."

(*f*) Turnley v. Macgregor, 6 M. & Gr. 46; 6 Scott, N. R. 906; 1 Dowl. & L. 506, S. C. Decision in case, on 9 Geo. 4, c. 14, § 6.

(*g*) Morgan v. Ruddock, 4 Dowl. 311, per Patteson, J.; Shearwood v. Hay, and Wills v. Langridge, 5 A. & E. 383; 6 N. & M. 831, S. C.; Wagstaffe v. Sharpe, 3 M. & W. 521, 525. In this last case, Parke, B., thus pronounced the judgment of the Court: "This case has been the subject of much consideration, but we have at length come to the conclusion, that as this is only a court of co-ordinate jurisdiction, we are bound by the decision in the Court of King's Bench, in Shearwood v. Hay and Wills v. Langridge, *however great the doubt which some of the members of this Court may feel as to the propriety of that decision*. The rule will therefore be discharged." In Steavenson v. Oliver, 8 M. & W. 234, there was a special plea.

(*h*) Davey v. Warne, 14 M. & W. 199; Richards v. Easto, 15 M. & W. 244. See, however, Hilliard v. Webster, 6 M. & Gr. 983.

(*i*) Field v. Woods, 7 A. & E. 114; 2 N. & P. 117, S. C.; Dawson v. Macdonald, 2 M. & W. 26; M'Dowall v. Lyster, id. 52.

special plea, may prove his partnership with the plaintiff, and that the claim forms part of the unsettled partnership account (*j*); and it appears equally clear that he may show, under the general issue, and without pleading in abatement, the nonjoinder of other joint-contractors as plaintiffs, or the misjoinder of plaintiffs who were not joint-contractors (*k*). It seems, also, that the *misjoinder* of a *defendant* may be set up as a defence on non assumption (*l*), though his *nonjoinder* is certainly only ground for a plea in abatement (*m*). This rule, which enables a defendant to object to the nonjoinder of parties as plaintiffs without pleading in abatement, does not extend to actions of detinue (*n*), or to actions of *tort* (*o*), unless, perhaps, in those cases, where, though the *form* of the action be in *tort*, it is substantially and necessarily founded on a *contract* (*p*); neither does it apply to actions of assumption which are brought by *executors* (*q*). Indeed, the rule, limited as it now is, seems to rest on no very safe foundation, and, to borrow the language of one of the learned judges, "it is unsatisfactory in principle, and ought not to be extended" (*r*). It may be hoped that the time will shortly arrive when it will no longer be allowed to prevail in any case.

§ 212. "In all actions upon *bills of exchange* and promissory

(*j*) *Brown v. Tapscott*, 6 M. & W. 122, per Parke, B.; *Worrall v. Grayson*, 1 M. & W. 166; *Pearson v. Skelton*, id. 505, per Parke, B.; *Payne v. Hales*, 5 M. & W. 598.

(*k*) *Solly v. Neish*, 2 C. M. & R. 358, 359, per Lord Abinger; 5 Tyr. 625, S.C.

(*l*) *Eliot v. Morgan*, 7 C. & P. 334, per Coleridge, J.

(*m*) *Rice v. Shute*, 5 Burr. 2611; *Cabell v. Vaughan*, 1 Saund. R. 291 d, 291 e; *King v. Hoare*, 13 M. & W. 505, 506; *Cocks v. Brewer*, 11 M. & W. 51. See 11 Geo. 4 & 1 Will. 4, c. 68, § 5, which provides, "that any one or more of mail contractors, stage-coach proprietors, or common carriers, may be sued by his, her, or their name or names only; and no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall *abate*, for the want of joining any co-proprietor, or co-partner, in such mail, stage-coach, or other public conveyance by land for hire as aforesaid."

(*n*) *Broadbent v. Ledward*, 11 A. & E. 209; 3 P. & D. 45, S. C.

(*o*) *Cabell v. Vaughan*, 1 Saund. R. 291 m, and cases there cited; *Wallis v. Harrison*, 5 M. & W. 142.

(*p*) *Cabell v. Vaughan*, 1 Saund. R. 291 f, and note (*g*), and 291 n.

(*q*) *Cabell v. Vaughan*, 1 Saund. R. 291 k, l, and m.

(*r*) *Broadbent v. Ledward*, 11 A. & E. 213, per Patteson, J.

notes, the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; e. g.; the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note" (s). This rule is confined to cases where the action is *only* on the bill or note, and on the promise to pay contained in or implied by law from it; and, consequently, if an executor or administrator declares on a bill or note payable to the testator or intestate, and lays a promise to pay himself, such latter promise being express, may be denied by a plea of non assumpsit (t); and the same plea will be admissible if the action be brought against an executor, and the declaration alleges a promise by him (u).

§ 213. In conformity with the rule of law established by the cases of *Hemming v. Trenery*, and *Davidson v. Cooper* (v), a defendant, under a plea that he did not make the note or accept the bill, cannot set up a defence that the instrument has been subsequently altered (w), unless the alteration is such as to render the stamp insufficient (x). Some doubts may be entertained whether this rule would prevail in cases, where the plaintiff declares on the instrument *as altered*, for, although this appears to have been the form of the declaration in *Parry v. Nicholson* (y), the attention of the Court was not drawn to that fact, the alteration being, in truth, an immaterial one; and *Cock v. Coxwell* (z), if still law, decides that, where a bill has been materially altered, and is declared on in its altered form, no special plea is necessary, as the plea of non accepit amounts to a statement that the defendant did not accept the bill set out in the declaration,

(s) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., I. Assumpsit, 5 B. & Ad. viii. See *Donaldson v. Thompson*, 6 M. & W. 316.

(t) *Timmis v. Platt*, 2 M. & W. 720.

(u) *Rolleston v. Dixon*, 14 Law J., Ex. N. S. 304.

(v) As to these cases, see ante, § 209.

(w) *Parry v. Nicholson*, 13 M. & W. 778; *Mason v. Bradley*, 11 M. & W. 590.

(x) *Calvert v. Baker*, 4 M. & W. 417, as explained by Parke, B., in *Mason v. Bradley*, 11 M. & W. 594; in *Davidson v. Cooper*, id. 787; and in *Parry v. Nicholson*, 13 M. & W. 780. See *Clifford v. Parker*, 2 M. & Gr. 909; 3 Scott, N. R. 233, S. C. (y) 13 M. & W. 778.

(z) 2 C. M. & R. 291; 4 Dowl. 187, S. C. See also *Hemming v. Trenery*, 9 A. & E. 926—928, and *Sibley v. Fisher*, 7 A. & E. 444; 2 N. & P. 430, S. C.

which, under the circumstances supposed, would be perfectly true. Where, indeed, a party had authorised the drawer of a bill to accept it *generally* in his name, and the drawer had affixed an acceptance payable at a particular place, such party was permitted, when an action was subsequently brought against him by the indorsee, to rest his defence on a traverse of the acceptance, because in this case the Court considered that the bill had never existed as an accepted bill, otherwise than as a bill payable at a particular place, and the defendant never did accept *such* a bill (z). So, if a defendant gives his acceptance in blank, and consents that the plaintiff shall draw thereon a bill at two months, but the plaintiff, in violation of the purpose contemplated, draws a bill at one month, the defendant may repudiate the bill under a plea of non acceptit (a); and where partners are sued as the acceptors of a bill, one of them, under a plea denying his acceptance, will be entitled to show that, within the knowledge of the plaintiff (b), the name of the firm was fraudulently used by his co-partner, who had no authority to accept the bill for partnership purposes (c).

§ 214. "In *debt on specialty or covenant*, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable" (d). It may be observed with reference to this rule, that if the plaintiff makes *profert* of the instrument, he must, under a plea of non est factum, produce and prove it at the trial, and cannot show that it has been destroyed, and give secondary evidence of its contents (e). The omission of any plea of non est factum, while it admits so much of the deed as is expanded on the record, has no larger effect; and consequently, if

(z) *Crotty v. Hodges*, 4 M. & Gr. 561; 5 Scott, N. R. 221, S. C.

(a) *Fisher v. Wood*, 1 Dowl. N. S. 54.

(b) The plaintiff's knowledge of the fraud must be proved by the defendant, who cannot rely on the existence of the fraud, and then call upon the plaintiff to prove the circumstances under which the bill was indorsed to him. *Musgrave v. Drake*, 5 Q. B. 185.

(c) *Jones v. Corbett*, 2 Q. B. 828.

(d) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., II. In Covenant and Debt, 5 B. & Ad. viii.

(e) *Smith v. Woodward*, 4 East, 585.

the plaintiff would avail himself of any part of the instrument not specified in the declaration, he must call the attesting witness, and prove the deed in the usual way (*f*). Thus if, in debt on bond, conditioned for the performance of an award, or of covenants in an indenture, or of articles of agreement, or the like, the defendant lets judgment go by default, and the plaintiff, having omitted to set out the condition of the bond in the declaration, suggests breaches on the roll, he must prove, not only the condition of the bond, the award, indenture or articles, and the breaches suggested, but also that the bond mentioned in the suggestion, and produced to the jury, is that on which the action is brought (*g*).

§ 215. In debt on an award, the plea of "no award," means no *valid* award; and although on an issue raised on such plea, the plaintiff will make out a *prima facie* case by proving the award, and producing the rule of reference, the defendant will be entitled to show that the arbitrator has not decided all the issues in the cause referred to him, or has otherwise not complied with the terms of the reference (*h*).

§ 216. "The plea of 'nil debet' shall not be allowed in any action. In actions of *debt on simple contract*, other than on bills of exchange and promissory notes, the defendant may plead that 'he never was indebted in manner and form as in the declaration alleged,' and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit. In other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance" (*i*).

(*f*) *Williams v. Sills*, 2 Camp. 519, per Lord Ellenborough; *Gillett v. Abbott*, 7 A. & E. 783, 786; 3 N. & P. 24, S. C.

(*g*) *Hodkinson v. Marsden*, 2 Camp. 121, per Lord Ellenborough; *Edwards v. Stone*, cited 1 Saund. R. 58 f.

(*h*) *Gisborne v. Hart*, 5 M. & W. 50; *Fisher v. Pimbley*, 11 East, 193, per Bayley, J.; *Dresser v. Stansfield*, 14 M. & W. 822.

(*i*) Reg. Gen. H. T. 4 Will. 4, Plead in Par. Act., II. In Covenant and Debt, 5 B. & Ad. viii.

The cases cited above, while treating of the action of assumpsit, will, for the most part, sufficiently illustrate the operation of these rules; but it may be here added, that in actions of debt for the amount of calls upon railway shares, the plea of never indebted would seem to put in issue all the matters required by the special act to be proved by the plaintiffs (*j*). As the new rules do not apply to replications, a plaintiff may still, in answering a plea of set-off, reply that he was not *nor is* indebted to the defendant, and under such replication may prove payment, though such proof would be inadmissible on a replication that the plaintiff *never* was indebted in manner and form as in the plea alleged (*k*).

§ 217. "The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea" (*l*). The word "detain," as used in a declaration in detinue, means that the defendant withholds the goods, and prevents the plaintiff from having the possession of them; and the plea of *non detinet* consequently puts in issue an *active* or *adverse* detention (*m*). But this plea puts in issue no other fact (*n*); and no question can be raised under it, as to whether the detention be lawful or unlawful. If, therefore, the defendant has any right to detain the goods in question, arising out of a joint interest with the plaintiff, a lien, a pledge for money unpaid, or the like, he must plead such right specially on the record (*o*). Neither can he avail himself of any of such defences under a plea of not possessed (*p*), because

(*j*) *Edinburgh and Leith Rail. Co. v. Hebblewhite*, 6 M. & W. 707; 8 Dowl. 802, S. C.; *Aylesbury Rail. Co. v. Mount*, 7 M. & Gr. 898. See ante, § 210.

(*k*) *Stockbridge v. Sussams*, 3 Q. B. 239; *Brown v. Daubeny*, 4 Dowl. 585; *Jackson v. Robinson*, 8 Dowl. 622. See errata at beginning of same vol.

(*l*) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., III. Detinue, 5 B. & Ad. ix.

(*m*) *Clements v. Flight*, 16 M. & W. 42, 49; 4 Dowl. & L. 261, S. C. In a declaration in detinue the allegation of bailment, whether general or special, is mere surplusage, and not traversable. *Id*.

(*n*) *Jones v. Dowle*, 9 M. & W. 19; *Whitehead v. Harrison*, 6 Q. B. 429, 431.

(*o*) *Mason v. Farnell*, 12 M. & W. 674; *Richards v. Frankum*, 6 M. & W. 420; *Barnewall v. Williams*, 7 M. & Gr. 403; 8 Scott, N. R. 120, S. C. In this last case, a plea of lien was added to pleas of *non detinet* and not possessed.

(*p*) *Mason v. Farnell*, 12 M. & W. 674, 683, 684, overruling *Lane v. Tewson*, 12 A. & E. 116 (*n*); 1 G. & D. 684, S. C. See also *Barnewall v. Williams*, 8 Scott, N. R. 120; 7 M. & Gr. 403, S. C.

this plea merely raises the question, whether the plaintiff has such a property in the goods as will enable him to maintain his action, and this he may have, though he is only entitled to a share of the goods (*p*), or has no right to the immediate possession (*q*). So, under a plea denying that the goods are the property of the plaintiff, the defendant cannot object that there are other persons, co-tenants with the plaintiff, who are not joined in the action (*r*).

§ 218. " In actions *on the case*, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.* In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only, that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not the plaintiff's right of way (*s*). * * In an action of slander of the plaintiff, in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of

(*p*) *Broadbent v. Ledward*, 11 A. & E. 209; 3 P. & D. 45, S. C.

(*q*) Co. Lit. 283 a, cited and explained 12 M. & W. 683, 684.

(*r*) *Broadbent v. Ledward*, 11 A. & E. 209; 3 P. & D. 45, S. C. See ante, § 211, as to this rule.

(*s*) The example in trover is here omitted, as requiring a separate discussion. See post, §§ 226, 227.

the goods by the defendant as a carrier for hire, or of the purpose for which they were received" (t).

§ 219. In considering the effect of the plea of not guilty as an admission of the facts stated by way of inducement, it matters not in what part of the declaration these facts are introduced. By the term *inducement* is meant that part of a declaration which contains a statement of the facts out of which the charge arises, or which are necessary or useful to make that charge intelligible (u). In short, it includes all the allegations, which do not involve the special charge alleged against the defendant (v); and although it is usual with good pleaders to introduce these facts as a preliminary statement, since by so doing the whole charge is rendered more perspicuous, yet, the pleading will be equally good in law, and the plea of not guilty will have precisely the same operation, though the inducement be inserted at the very end of the declaration, or be interwoven, by way of parenthesis, with the charge itself (w); for it will then, as Mr. Baron Parke expressed it, "be simply inducement put in the wrong place" (x).

§ 220. In accordance with the examples given by the judges in the rule as above stated, it has been held, that, in an action on the case for diverting water, the plea of not guilty puts in issue only the fact of the diversion, and admits the plaintiff's right to the use of the stream as described in the declaration (y). So, in case against a carrier for not safely conveying goods, the defendant, under the plea of not guilty, cannot set up that the damage was occasioned by the plaintiff himself, either by misrepresenting the weight of the goods, or by unskilfully packing them in the defendant's van; but if he relies on these facts as a defence, he must plead that he was induced by the plaintiff's misrepresentation

(t) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., IV. In Case, 5 B. & Ad. ix.

(u) Per Tindal, C. J., in *Taverner v. Little*, 5 Bing. N. C. 685; per Lord Abinger, in *Wright v. Lainson*, 2 M. & W. 744.

(v) *Wright v. Lainson*, 2 M. & W. 748.

(w) Per Lord Abinger, in *Dunford v. Trattles*, 12 M. & W. 534; *Torrence v. Gibbins*, 5 Q. B. 297.

(x) *Lewis v. Alcock*, 3 M. & W. 190.

(y) *Frankum v. Earl of Falmouth*, 2 A. & E. 452; 4 N. & M. 330; 6 C. & P. 529, S. C. See *Ward v. Robins*, 15 M. & W. 237.

to take a greater load than the van could safely carry, and must deny the acceptance of the goods for the purpose alleged (*x*). So, where a declaration in case stated that the defendant, being possessed of a horse and cart, negligently drove against the plaintiff's horse, the plea of not guilty was held to admit that the defendant was the person driving, and that the cart and horse were his (*a*); and in like manner, it has several times been determined, that, in an action against a defendant, either for negligent driving by his servant, or for the carelessness of his servants in the management of his ship, the plea of the general issue admits the defendant's possession, and that the persons causing the damage were his servants, and merely puts in issue the fact of negligence or mismanagement (*b*). So, in an action for seducing the daughter of the plaintiff, she being his servant, the defendant will be held to have admitted the service, if he has only pleaded the general issue (*c*); and it seems, on principle, though the point has not been expressly decided, that in an action for adultery, whether in the form of case or trespass, the plea of not guilty will admit the marriage.

§ 221. Again, in an action against a witness for disobeying a subpoena, where the declaration stated that the plaintiff had a good cause of action in the original suit, and the pleas were not guilty, leave and licence, and that the plaintiff could have proceeded to trial without the testimony of the defendant, it was held that, on these pleadings, the record of the previous action, which had been put in evidence by the plaintiff, could not be referred to by the defendant, for the purpose of showing that it contained no ground of action; still less could he produce evidence himself in order to establish that negative fact. Had he wished to deny that the plaintiff had a good cause of action in the original suit, he should have traversed the allegation to that effect (*d*). So, also, in an action

(*x*) *Webb v. Page*, 6 M. & Gr. 196. See ante, § 198, at the end.

(*a*) *Taverner v. Little*, 5 Bing. N. C. 678; 7 Scott, 796, S. C.; *Wheatley v. Patrick*, 2 M. & W. 652, per Alderson, B.

(*b*) *Dunford v. Trattles*, 12 M. & W. 529; 1 Dowl. & L. 554, S. C.; *Hart v. Crowley*, 12 A. & E. 378; *Woolf v. Beard*, 8 C. & P. 373, per Coleridge, J.

(*c*) *Torrence v. Gibbins*, 5 Q. B. 297; 1 D. & Mer. 226, S. C. overruling *Holway v. Abell*, 7 C. & P. 528. (*d*) *Needham v. Fraser*, 1 Com. B. 815.

for defamation, though Not guilty puts in issue, not only the publication of the libel, but its publication maliciously, and in the sense imputed in the innuendo; yet, as an innuendo cannot enlarge the meaning of words, unless it be connected with some matter of fact before expressly averred (*e*), and as, consequently, it becomes necessary, wherever particular words have acquired some sense different from their natural one, to explain their meaning in a preliminary averment, it follows that such averment must be specially traversed as containing matter of inducement, and that its truth cannot be put in issue by the plea of not guilty. For instance, if the defendant has called the plaintiff a black sheep, a black-leg, a sharp, or the like, the declaration must contain an averment that these words were used by the defendant, and understood by the persons he addressed, as meaning a man of profligate and fraudulent character, and the defendant must then traverse this interpretation, if he intends to disprove the meaning attached to the words (*f*).

§ 222. But though the plea of not guilty in case admits the truth of the facts stated by way of inducement, its effect is not confined to a denial of the *mere act* charged to have been committed, but it also puts in issue all those circumstances stated in the declaration, which give it a *tortious* character and constitute the *injury*, and which do not amount to a *recital of the plaintiff's title or right, or of any preliminary proceeding*. Thus, in an action for maliciously and without probable cause, either indicting the plaintiff (*g*), or refusing to accept a tender of debt and costs, for which the plaintiff was in execution at the defendant's suit (*h*), or the like, the plea of not guilty puts in issue the fact of prosecution, refusal, &c. (*i*), as also the malice (*j*), and the want of probable cause. So, in case for keeping a mischievous dog,

(*e*) *Angle v. Alexander*, 7 Bing. 119, 122, 123; 4 M. & P. 870, S. C.

(*f*) *M'Gregor v. Gregory*, 11 M. & W. 287, 295, 296.

(*g*) *Cotton v. Browne*, 3 A. & E. 312; 4 N. & M. 831, S. C.

(*h*) *Hounsfield v. Drury*, 11 A. & E. 98.

(*i*) *Cotton v. Browne*, 3 A. & E. 312, recognised in *Mummery v. Paul*, 1 Com. B. 325.

(*j*) See *Porter v. Weston*, 5 Bing. N. C. 715; 8 Scott, 25, S. C.; *Watkins v. Lee*, 5 M. & W. 270.

which worried the plaintiff's cattle, the plea of not guilty puts in issue the scienter, as well as the dog's propensity; for in such case the defendant's knowledge of the mischievous habits of the dog is no inducement, but a substantial part of the cause of action (*j*). So, in an action for a nuisance, the plaintiff must prove, under not guilty, that there was a nuisance, and that the defendant caused it (*k*). So, also, in case for slander or libel, the defence of privileged communication, as it goes to the very root of the matter of complaint, need not be specially pleaded, but will be available under the general issue (*l*); and in case for deceit in the warranty of a horse, not guilty puts in issue both the warranty and the unsoundness; and, in short, the whole declaration, excepting, perhaps, the bargain and sale, which have been held to be matters of inducement (*m*). Whether this exception can be sustained may well admit of a doubt, since, unless there was a sale, the deceit would be of no consequence (*n*); and on this ground it has been decided, that, in an action upon the case for a fraudulent representation on the sale of a commission business, the plaintiff, under the plea of not guilty, was bound to prove, not only that the representation was made, and that the defendant knew it to be false (*o*), but also the fact of the sale (*p*).

§ 223. In case, too, for *negligence*, whereby the plaintiff or his property has been injured, the defendant, under not guilty, may show that the damage was occasioned, either wholly by the negligence of the plaintiff (*q*), or that it was partly the plaintiff's fault, and might have been avoided had he used ordinary care (*r*).

(*j*) *Thomas v. Morgan*, 2 C. M. & R. 496; 5 Tyrw. 1085, S. C.

(*k*) *Dawson v. Moore*, 7 C. & P. 25, per Lord Abinger; *Mummery v. Paul*, 2 Dowl. & L. 585, per Maule, J.

(*l*) *Lillie v. Price*, 5 A. & E. 645; 1 N. & P. 16; 5 Dowl. 432, S. C.; *Hemming v. Trenery*, 9 A. & E. 930, per Lord Denman.

(*m*) *Spencer v. Dawson*, 1 M. & Rob. 552, per Parke, B. See also *Mash v. Densham*, id. 442.

(*n*) See *Mummery v. Paul*, 1 Com. B. 322, 325.

(*o*) *Mummery v. Paul*, 1 Com. B. 316; 2 Dowl. & L. 282.

(*p*) *Mummery v. Paul*, 1 Com. B. 316.

(*q*) *Gough v. Bryan*, 2 M. & W. 770.

(*r*) *Bridge v. Grand Junct. Rail. Co.*, 3 M. & W. 244; *Butterfield v. Forrester*, 11 East, 60; *Davies v. Mann*, 10 M. & W. 548, 549, per Parke, B.; *Holden v. Liverpool New Gas Co.*, 3 Com. B. 1.

What shall be deemed *ordinary* care on the part of the plaintiff cannot be very easily defined, as it must necessarily vary according to the circumstances of each case; but thus much is clear, that the term is a relative one, to be construed in connection with the plaintiff's situation; and, therefore, if he be a child or a person of weak intellect, conduct, which in a grown man of sense would be regarded as careless or even blameable, may in his case be deemed insufficient to warrant a verdict for the defendant (*p*). There is also no doubt in the present day, though the law has sometimes been less strictly laid down (*q*), that, unless the defendant can prove the absence of that degree of care which might reasonably be expected from a person in the plaintiff's position, and the exercise of which would have avoided the accident, he cannot succeed in his defence, if he has himself acted with any degree of negligence (*r*); though if he can furnish such proof, he will succeed, though he has been guilty of careless, or, perhaps, even of illegal conduct (*s*).

§ 224. Again, in case for erecting a cesspool near the plaintiff's well, and thereby contaminating the water of the well, the plea of not guilty denies both the erection and the *consequent* contamination, or in other words, "it puts in issue both the act complained of and its consequences" (*u*). If these last words are to be understood as bearing an universal application, they seem to go some way in shaking the authority of *Wylie v. Birch* (*v*). That was an action against a sheriff for a false return, to which the defendant pleaded three pleas, showing by necessary implication that the plaintiff could sustain no damage thereby, and, consequently, that the action was not maintainable (*w*). These pleas were demurred to as amounting to not guilty, but the Court held that they were good, as they

(*p*) *Lynch v. Nurdin*, 1 Q. B. 29; 4 P. & D. 672, S. C.

(*q*) *Vanderplank v. Miller*, M. & M. 169, per Lord Tenterden; *Pluckwell v. Wilson*, 5 C. & P. 375, per Alderson, B.; *Luxford v. Large*, id. 421, per Lord Denman; *Vennall v. Garner*, 1 Cr. & Mee. 21.

(*r*) *Davies v. Mann*, 10 M. & W. 546; *Lynch v. Nurdin*, 1 Q. B. 36.

(*s*) *Marriott v. Stanley*, 1 M. & Gr. 568, 576, per Maule, J., and cases cited in notes (*a*) and (*c*) to p. 576; 1 Scott, N. R. 392, S. C. As to the different effect of not guilty in actions of *trespass* arising out of collision, see post, § 229.

(*u*) *Norton v. Scholefield*, 9 M. & W. 665, per Parke, B. (*v*) 4 Q. B. 566.

(*w*) See *Williams v. Mostyn*, 4 M. & W. 145, and cases there cited.

negatived the suggestion of damage, arising upon the defendant's admitted breach of duty. "The new rules," said Lord Denman in pronouncing the judgment of the Court, "do not exactly provide for actions of tort, where the wrong is not direct, and of such a nature as necessarily to injure the plaintiff in the eye of the law, but only does so, if some special damage is brought upon him. One of the examples of the effect of pleading not guilty is the action for an escape, where that plea is declared to 'operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings,' nothing being said as to *the injurious result*" (x). Again, in actions on the case for malicious arrest, for maliciously proceeding to outlawry, for maliciously suing out a fiat in bankruptcy, and the like, the plea of not guilty admits the determination of the proceedings as averred in the declaration, such determination being, in strictness, no part of the defendant's tortious conduct, and being at best but an element in proving want of probable cause (y).

§ 225. The new rules further provide, that in actions on the case, "all matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit" (z). This comprehensive language renders it needless to introduce here any separate observations respecting the matters, which in actions on the case, may or must be specially pleaded, since by turning to what has been stated before, while treating of the action of assumpsit (a), it will be seen how the new rules have been interpreted in relation to this subject; but the reader may be reminded, in passing, that, in an action on the case for making a false representation as to the credit of a third party, the defendant cannot plead that the representation was not in writing signed by himself (c), such plea amounting to the general issue (d).

(x) 4 Q. B. 579.

(y) *Atkinson v. Raleigh*, 3 Q. B. 79; *Watkins v. Lee*, 5 M. & W. 270; *Drummond v. Pigou*, 2 Bing. N. C. 114; 2 Scott, 228, S. C. The rule as to the non-joinder of parties as plaintiffs has already been stated, see ante, § 211.

(z) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., IV. Case, 5 B. & Ad. ix.

(a) Ante, §§ 205, 209, 211.

(c) According to the provisions of 9 Geo. 4, c. 14, § 6.

(d) *Turnley v. Macgregor*, 6 M. & Gr. 46; ante, § 210.

§ 226. "In an action of *trover* for converting the plaintiff's goods, the plea of not guilty will operate as a denial of the conversion only, and not of the plaintiff's title to the goods" (e). The most difficult question that has arisen on the construction of this rule has related to the effect of the word "conversion." For several years it was held, in conformity with a decision of the Court of Exchequer in *Stancliffe v. Hardwick* (f), that this word did not signify *wrongful* conversion, but the mere *fact* of conversion, and, consequently, that under the plea of not guilty, the lawfulness or unlawfulness of the act of conversion could not come in question. It has recently, however, been admitted by the Barons of the Exchequer, that they came to an erroneous conclusion in that case, and that, in fact, the new rules have made no difference as to the meaning of a conversion (g). As therefore, before these rules, the plea of not guilty put in issue, not only the act itself, but all the circumstances which rendered the act wrongful, precisely the same effect must be given to the plea now, excepting only that, as it admits the plaintiff's title, it must be coupled with the plea of not possessed, whenever the defence set up is inconsistent with the existence of such title. Thus, under the general issue alone the defendant cannot rely on the fact, that the chattel in question had been sold or given to him by the plaintiff, though the only evidence of conversion is a demand and refusal (h); neither, it seems, is such a defence as a lien, a pledge, or the like, admissible under this plea (i); but the defendant must put on the record the plea of not possessed, which denies the plaintiff's right to the immediate possession of the goods, as well as his property in them (j).

§ 227. In commenting on the decisions which established this

(e) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., IV. Case, 5 B. & Ad. ix.

(f) 2 C. M. & R. 1; 5 Tyrw. 551, S. C.; *Vernon v. Shipton*, 2 M. & W. 9; *Barton v. Brown*, 5 M. & W. 298; *Weeding v. Aldrich*, 9 A. & E. 861, 863, 866, 867, per Coleridge, J.; 1 P. & D. 657, S. C.

(g) *Whitmore v. Greene*, 13 M. & W. 107, per Parke, B.; *Kynaston v. Crouch*, 14 M. & W. 272, per id. (h) *Barton v. Brown*, 5 M. & W. 298.

(i) *White v. Teale*, 12 A. & E. 114; 4 P. & D. 43, S. C.

(j) *Owen v. Knight*, 4 Bing. N. C. 54; 5 Scott, 307; 6 Dowl. 245, S. C.; *Mason v. Farnell*, 12 M. & W. 683; *Brandão v. Barnett*, 1 M. & Gr. 908; 2 Scott, N. R. 96, S. C.

rule, the barons of the Court of Exchequer have recently declared, that it is proper to abide by their authority, though they significantly add, that "no doubt plausible reasons may be assigned for saying, that the proper plea on which such a defence as a lien, or the like may be made, is the plea of not guilty, by which the conversion is denied" (*k*). On the whole, it seems now clearly determined that as the conversion, on which an action of trover is founded, is always a wrongful act, it cannot be confessed and avoided by any matter in *excuse*, for if the circumstances relied on show that the sale or detention of the chattel was lawful, they will disclose no conversion in law (*l*). In fact, the pleas of not guilty and not possessed together now make up the old plea of not guilty; and whatever might be given in evidence under that plea, before the new rules, may be now proved under one or other of these pleas (*o*); in other words, every defence upon the merits may be set up, except the statute of limitations (*p*), the nonjoinder of other parties as plaintiffs (*q*), an accord and satisfaction (*r*), a release (*s*), a prior judgment recovered by or against the defendant (*t*), or against a third party (*u*), or other the like defence, which, admitting the plaintiff's property, and the defendant's wrongful conversion at some time past, assigns some subsequent matter whereby the action has become no longer sustainable (*v*). It will be seen, by referring back to the rule of pleading in detinue (*w*), how wide a distinction exists between Non-detinet and Not possessed in that form of action, and the analogous pleas

(*k*) *Mason v. Farnell*, 12 M. & W. 683.

(*l*) *Id.*; *Whitmore v. Greene*, 13 M. & W. 107, per Parke, B.

(*o*) *Whitmore v. Greene*, 13 M. & W. 107, per Alderson, B.; *Unwin v. St. Quintin*, 11 M. & W. 277; *Leake v. Loveday*, 4 M. & Gr. 972; 2 Dowl. N. S. 624, S. C.; *Isaac v. Belcher*, 5 M. & W. 139; 7 Dowl. 516, S. C.; *Wilkinson v. Whalley*, 5 M. & Gr. 590; *Howarth v. Tollemache*, 4 M. & Gr. 427.

(*p*) *Philpott v. Kelley*, 3 A. & E. 106; *Swayn v. Stephens*, Cro. Car. 245, 333; *Cowper v. Towers*, 1 Lutw. 99.

(*q*) See ante, § 211.

(*r*) *Pears. Chit. Pl.* 683, n. (*a*).

(*s*) *Hawley v. Peacock*, 2 Camp. 558, per Lord Ellenborough.

(*t*) *Lechmore v. Toplady*, 1 Show. 146.

(*u*) *Cooper v. Shepherd*, 4 Dowl. & L. 218.

(*v*) See *White v. Spettigue*, 13 M. & W. 603; *Comyns v. Boyer*, Cro. Eliz. 485; *Leyfield's case*, 10 Rep. 88, (*b*); *Unwin v. St. Quintin*, 11 M. & W. 277; *Cooper v. Shepherd*, 4 Dowl. & L. 224, 225, per Tindal, C. J.

(*w*) Ante, § 217.

in actions of trover; a distinction which, however well founded it may be, on technical reasoning, evinces no very scientific knowledge in the original framing of the rules, and is calculated, unless carefully attended to and understood by the pleader, to lead to great embarrassment at the trial, and possibly to as great injustice.

§ 228. "In actions of *trespass quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially. In actions of *trespass de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein" (q). In accordance with this last rule, it seems clear that a defendant cannot, under the general issue, give in evidence a lien, or show that he had any other special property in the goods seized at the time of the trespass; but if he intends to rely on any such defence, he must either plead specially, or perhaps more correctly traverse the plaintiff's possession (r). In one case of trespass for seizing furniture, where the evidence established the seizure in a stranger's house, Mr. Justice Coleridge is reported to have held, that, without some proof connecting the plaintiff with the stranger or the goods, the defendant would be entitled to a verdict on his plea of not guilty (s); but this dictum, if indeed it was ever pronounced, seems obviously opposed to the express language of the rule stated above, and is, moreover, at variance with the principle of law laid down in *Dunford v. Trattles* (t) by the Court of Exchequer. We therefore merely cite the case in order to warn our readers against considering it as an authority. Again, it is undoubted law that, in an action of trespass for taking the plaintiff's goods, the defendant cannot, under the

(q) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., V. Trespass, 5 B. & Ad. ix. x. These rules also provide, that pleas of rights of way, or of common, or other similar rights may be taken distributively.

(r) *Jackson v. Cummins*, 5 M. & W. 344, 349, per Parke, B. *Richards v. Symonds* 8 Q. B. 90

(s) *Forman v. Dawes*, C. & Marsh. 127.

(t) 12 M. & W. 529, ante, § 220.

general issue, prove in mitigation of damages a re-payment by him, after action brought, of the money produced by the sale of the goods (*t*). Whether, if such an action be brought against an attorney, and it be proved that he delivered a *fieri facias* to the sheriff who thereupon took the goods, the defendant will be entitled, under the general issue, to give in evidence a judgment on which the *fieri facias* issued, is a point not yet decided (*u*); but the better opinion seems to be, that such evidence would not be admissible without being specially pleaded. Perhaps, however, the attorney, under the plea of not guilty, might show that, though to a certain extent he had interfered in the transaction, his conduct was not such as to involve responsibility. For instance, he would probably be allowed to prove, that he had merely handed over the writ to the sheriff's officer, with no more concurrence than that of a postman who conveys a letter (*v*).

§ 229. The new rules contain no provision in regard to the plea of not guilty in actions of trespass for assault, or other injury to the *person*. Nor was it necessary that they should, inasmuch as, before they were promulgated, that plea merely denied that the defendant did the act complained of, and all matters in *confession and avoidance*, or in *justification* or *discharge*, were, as they still are, required to be specially pleaded (*w*). Some doubts have existed as to the effect of not guilty in actions of trespass, which arise out of *collisions*; but it seems now pretty generally understood, that, on the one hand, the defendant, under this plea, may show either that the plaintiff drove against him instead of his driving against the plaintiff (*x*), or that his horse was frightened and rendered ungovernable by

(*t*) *Rundle v. Little*, 6 Q. B. 174. Lord Denman there observed, "It is important to uphold the principle, that a plaintiff is entitled to recover by way of damages all that, at the commencement of the suit, he has lost through the wrongful act for which the defendant is sued.

(*u*) *Rundle v. Little*, 6 Q. B. 174.

(*v*) *Rundle v. Little*, 6 Q. B. 177, per Lord Denman; and *Green v. Elgie*, 5 Q. B. 113, 114, per *id.*, explaining a dictum of Patteson, J. in *Codrington v. Lloyd*, 8 A. & E. 453, and a ruling of Lord Kenyon in *Sedley v. Sutherland*, 3 Esp. 203.

(*w*) 1 Chit. Pl. 534, 535. As to the nonjoinder of other parties as plaintiffs, see ante, § 211.

(*x*) *Pearcy v. Walter*, 6 C. & P. 232, per Gaselee, J.

the act of a third person (*y*), or by the act of God, as by thunder or lightning, or, in short, that the accident had resulted entirely from a superior agency (*z*); but, on the other hand, he cannot prove that the injury done by him was unintentional or merely accidental, or was even occasioned by the negligence of the plaintiff, because his act, being *prima facie* unjustifiable, requires an excuse to be shown by a special plea (*a*). By contrasting what is here said with our former observations (*b*) on the effect of not guilty in case for negligence, the distinction between the general issue, as pleaded to one or other of the two forms of action, trespass and case, will be at once apparent (*c*).

§ 230. The effect of not guilty in actions of trespass may, in general, be ascertained with tolerable certainty, if the doctrine laid down by Lord Mansfield, that "no man is bound to justify who is not *prima facie* a trespasser" (*d*), be used as a test. Thus, a pound-keeper, who has had nothing to do with the seizure of the plaintiff's cattle, but who, without exceeding his duty or assenting to the original trespass, has merely impounded the cattle when brought to him, may establish a successful defence on the plea of not guilty; though a gaoler, who has a prisoner in custody, must justify, because he is *prima facie* guilty of an imprisonment, and cannot have acted legally without a warrant (*e*). So, it seems that a judge of the Superior Courts, who in his judicial capacity commits a man for a contempt, may, under not guilty, defend an action of trespass (*f*), though, perhaps, a ministerial or magisterial officer would be bound to place on the record a special plea (*g*).

(*y*) *Gibbon v. Pepper*, 2 Salk. 637; 1 Lord Raym. 38, S. C.; *Goodman v. Taylor*, 5 C. & P. 410, per Lord Denman.

(*z*) *Hall v. Fearnley*, 3 Q. B. 919.

(*a*) *Id.*; *Boss v. Litton*, 5 C. & P. 407, per Lord Denman; *Weaver v. Ward*, Hob. 134, 5th ed.; *Knapp v. Salsbury*, 2 Camp. 500, per Lord Ellenborough. See *Wakeman v. Robinson*, 1 Bing. 213; 8 B. Moore, 63, S. C.

(*b*) *Ante*, § 223.

(*c*) See *Hall v. Fearnley*, 3 Q. B. 920, per Lord Denman.

(*d*) *Badkin v. Powell*, 2 Cowp. 478. See *Milman v. Dolwell*, 2 Camp. 378, per Lord Ellenborough. (*e*) *Badkin v. Powell*, 2 Cowp. 478, 478, 479.

(*f*) *Dicas v. Lord Brougham*, 6 C. & P. 249, 270, per Lord Lyndhurst; 1 M. & Rob. 309, S. C.; *Bushell's case*, 1 Mod. 119.

(*g*) Per *Campbell, S. G.*, *arguendo*, in 6 C. & P. 269; *Garnett v. Ferrand*,

If an action of trespass be brought by a husband and wife for an assault committed on the wife, the plea of not guilty will not put in issue the marriage (*g*); but it may be a question of some doubt, whether, if trespass be brought against husband and wife for an assault committed by her, the man may not dispute the marriage under the general issue.

§ 231. Having thus discussed the general effect of pleading not guilty in actions of trespass, it may next be observed, that in trespass *de bonis asportatis*, a plea denying that the goods are the plaintiff's, puts in issue not only the *possession* of the goods, but the *property* in them. This point was decided in *Harrison v. Dixon* (*h*); but the pleader, who relies on this case as an authority, must bear in mind that the Court of Queen's Bench have held in *Whittington v. Boxall* (*i*), that, in trespass *quare clausum fregit*, such a plea puts in issue only the possession, and therefore, if the defendant not only contests the possession of the plaintiff in fact, but also relies on title, in case actual possession is proved by the plaintiff, he cannot rest his defence on this plea, but must plead in confession and avoidance. The distinction between these two cases appears to be, that the plaintiff's title to *goods* can be disputed only by denying his possession; whereas, if the question relate to the title to *land*, a plea of *liberum tenementum* may be put on the record (*j*). Perhaps, however, *Whittington v. Boxall* is not law; for not only is it directly opposed to an older case in the Exchequer (*k*), but in *Harrison v. Dixon*, Mr. Baron Parke intimated a doubt as to its correctness. His reasoning, as reported, is as follows:—"Before the new rules, the general issue, not guilty, put in issue the plaintiff's title, because, under that plea, the defendant might dispute both the fact of the trespass, and also the

9 D. & R. 657; 6 B. & C. 611, S. C.; *Beardmore v. Carrington*, 2 Wils. 244; *Burdett v. Abbot*, 14 East, 1.

(*g*) *Dickinson v. Davis*, 1 Stra. 480. See *Chantler v. Lindsey*, 4 Dowl. & L. 339.

(*h*) 12 M. & W. 142; 1 Dowl. & L. 454, S. C. This case appears to overrule *Carter v. Johnson*, 2 M. & Rob. 263, per Lord Abinger, and *Ashmore v. Hardy*, 7 C. & P. 501, 505, 506, per Patteson, J.

(*i*) 5 Q. B. 139; 1 D. & Mer. 184, S. C. See also *Heath v. Milward*, 2 Bing. N. C. 98; 2 Scott, 160, S. C.; *Brown v. Dawson*, 12 A. & E. 624.

(*j*) 12 M. & W. 145, per Parke, B.

(*k*) *Purnell v. Young*, 3 M. & W. 288, 296; 6 Dowl. 367, S. C.

fact that it was committed on the plaintiff's close. Now the plea, denying the close to be the plaintiff's, is a denial of his title to the same extent, as he would have been obliged to prove it under the general issue" (l).

§ 232. The new rules further provide, that, "in actions of trespass *quare clausum fregit*, the close or place in which, &c., must be designated by name or abutments, or other description; in failure whereof the defendant may demur specially" (m). The object of this rule was to avoid the ambiguity that would arise if the name of the parish alone were given, and thus to save the defendant from the necessity of pleading *liberum tenementum* (n), and the plaintiff from the necessity of a new assignment (o). A description by two abutments only will be sufficient to satisfy the rule in the first instance (p), though if the words "abutting *towards*" are used instead of "abutting *upon*," the declaration will be demurrable (q); and in all cases a judge, on application, will order a better description to be given, if the defendant can show that any real ambiguity exists, and that he cannot distinctly see what close is indicated by the declaration (r). This rule is here noticed for the purpose of observing, that, if the defendant, instead of objecting to the description of the close, sets up a title in himself to the locus in quo, or otherwise pleads a justification, he will be considered as knowing what close is meant by the plaintiff, and cannot afterwards deny the correctness of the designation; and, consequently, the plaintiff will succeed, on proof of a trespass committed in a close in his possession, to which the description applies with tolerable accuracy (s), though the defendant has another close, which answers to the same description (t). It matters not in the application of

(l) 12 M. & W. 145, 146.

(m) Reg. Gen. H. T. 4 Will. 4, Plead. in Par. Act., V. Trespass, 5 B. & Ad. ix.

(n) This is a good plea, though the close be particularly described in the declaration. *Harvey v. Brydges*, 14 M. & W. 437.

(o) *North v. Ingamells*, 9 M. & W. 251, 252, per Parke and Alderson, Bs.

(p) *North v. Ingamells*, 9 M. & W. 249.

(q) *Lempriere v. Humphrey*, 3 A. & E. 181.

(r) 9 M. & W. 252, per Alderson, B.

(s) See *Webber v. Richards*, 1 Q. B. 439.

(t) *Lempriere v. Humphrey*, 3 A. & E. 181; *Cocker v. Crompton*, 1 B. & C. 489; 2 D. & R. 719, S. C.; *Cooke v. Jackson*, 9 D. & R. 495. See *Ellison v. Isles*, 11 A. & E. 665; 3 P. & D. 391, S. C.; and *Webber v. Sparkes*, 10 M. & W. 485.

this rule, whether the spot be designated by name or by abutments (*t*). If, indeed, the plaintiff and defendant have separate parts of one entire close, and the former brings an action against the latter for trespassing on his close, describing it either by name or by metes and bounds, the defendant, under a plea that the close is his soil and freehold, is not bound to prove a title to the *whole* close, but he will succeed if he establishes a title to *that part* of the close on which *all* the trespass has been committed. "By this plea," said Mr. Baron Alderson, in pronouncing the judgment of the Court in *Smith v. Royston*, "the defendant undertakes to prove two propositions:—first, that some part of the described close belongs to him; and secondly, that it is on this part of the close that all the acts complained of have been done. If he does this, he is entitled to the verdict; if not, the plaintiff must succeed" (*u*).

§ 233. We have been hitherto discussing the operation of the new rules in limiting and defining the amount of evidence admissible under the general issue in ordinary cases; but it must be carefully borne in mind that that numerous class of cases, in which the defendant is expressly empowered *by statute to plead the general issue*, and to give special matter in evidence under it, is not affected by these rules (*v*), further than this, that the party who intends so to plead must now "insert in the margin of the plea the words 'by statute,' otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue, and of the *Nisi Prius* record" (*w*). This last salutary rule, which effectually

(*t*) *Id.*; *Smith v. Royston*, 8 M. & W. 386, per Alderson, B.

(*u*) 8 M. & W. 381, 387. See also *Richards v. Peake*, 2 B. & C. 918; 4 D. & R. 572, S. C.; *Bassett v. Mitchell*, 2 B. & Ad. 99; *Tapley v. Wainwright*, 5 B. & Ad. 395; 2 N. & M. 697, S. C.

(*v*) The Law Amendment Act, 3 & 4 Will. 4, c. 42, which empowered the judges to make the new rules, expressly provided, in § 1, "That no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be in force." The act of 1 & 2 Vict., c. 100, which continues, under certain limitations, the powers given to the judges by the former act, contains a precisely similar proviso at the end of § 1, excepting only that the word "Regulation" is inserted after the word "order."

(*w*) Reg. Gen. T. T. 1 Vict., 4 M. & W. 3.

protects the plaintiff from being taken by surprise at the trial, had not been long in operation before an attempt was made to set aside its authority, on the ground that the judges had no power to make it; but the Court of Common Pleas very properly determined, that, even assuming that the Law Amendment Act gave no direct or implied authority to make such a rule, (a negative proposition which they considered it would be difficult to maintain), still the rule might be supported as founded upon a jurisdiction, necessarily inherent in all courts, to make rules for the regulation of their practice (*x*). When the defendant has pleaded not guilty by statute, his attorney must take care that the words "by statute" are properly inserted in the margin of the issue and of the *Nisi Prius* record; for otherwise the judge will not allow him to enter into the general defence, unless he can distinctly show, and this may be a matter of some difficulty, that these words were duly introduced in the margin of the copy of the plea, which was sent to the plaintiff (*y*). If the plaintiff cannot discover the Act on which the defendant relies, the Court, on an affidavit of that fact, will direct the defendant to furnish him with the requisite information, on pain of having the words "by statute" struck out of the plea (*z*).

§ 234. It is extremely difficult to lay down as an abstract proposition of law, what shall amount to an *acting in pursuance of a statute*, so as to entitle a defendant to give special matter in evidence under the general issue, to rely on the want of notice of action, or on the fact that he has tendered amends, or otherwise to claim any particular protection which the act of parliament affords; but, perhaps, thus much may be stated with safety, that if a party believes, with some colour of reason (*a*), and *bonâ fide*, that he is acting in due execution of the authority vested in him by the legislature, he is entitled to protection, although he may proceed

(*x*) *Bartholomew v. Carter*, 3 M. & Gr. 125, 131; 3 Scott, N. R. 529; 9 Dowl. 896, S. C.

(*y*) *Forman v. Dawes*, C. & Marsh. 127, per Coleridge, J.

(*z*) *Coy v. Lord Forester*, 8 M. & W. 312; 9 Dowl. 770, S. C.

(*a*) *Cann v. Clipperton*, 10 A. & E. 582; *Cook v. Leonard*, 6 B. & C. 351; 9 D. & R. 339, S. C., as qualified by the Court of Exchequer in *Jones v. Gooday*, 9 M. & W. 743, 745.

illegally or exceed his jurisdiction (*δ*). Statutes of this kind are intended for the protection of honest persons, who *bonâ fide* mean to discharge their duty (*c*); and the Court will consequently so interpret their provisions, as to save harmless all persons who act illegally under the reasonable belief that they are authorised in what they do by the act of parliament; and this, too, whether the error complained of has been committed in respect of *time, place, or circumstance* (*d*).

§ 235. It is now finally determined that, under the plea of *not guilty by statute* the defendant may set up any defence that could be specially pleaded, whether it be founded wholly or partly on the statute, or be merely sustainable at common law (*e*). Thus, in an action for an excessive distress, such a plea puts in issue, not only the matter of justification, but the tenancy and the ownership of the goods (*f*); and if a plaintiff sues as administrator, the defendant, who has thus pleaded, may dispute his title to that character (*g*). The natural result of this rule is, that the Courts will not, in general, allow the defendant to plead the general issue by statute in connexion with special pleas; because, by so doing, he would plead the same matter twice over, and thus contravene the salutary rule which forbids the use of several "pleas, founded on one and the same principal matter, but varied in statement, description, or circumstances only" (*h*). It seems, however, that if a reasonable

Mellon v. Leath (*δ*) *Hazeldine v. Grove*, 3 Q. B. 997, 1006, 1007; 3 G. & D. 210, S. C.; *Jones v. Gooday*, 9 M. & W. 736, 743—746, per Parke, and Alderson, Ba.; *Theobald v. Crichmore*, 1 B. & A. 227, 229, 230, per Lord Ellenborough, and Bayley, J. See further, *Eliot v. Allen*, 1 Com. B. 18; *Shatwell v. Hall*, 10 M. & W. 523; 2 Dowl. N. S. 567, S. C.; *Hopkins v. Crowe*, 4 A. & E. 774; *Lidster v. Borrow*, 9 A. & E. 654; *Bush v. Green*, 4 Bing. N. C. 41; *Smith v. Shaw*, 10 B. & C. 277; 5 M. & Ry. 225, S. C. *Davis v. Arling v. 2. 5. 386*

(*c*) Per Parke, B., in *Jones v. Gooday*, 9 M. & W. 743.

(*d*) *Hughes v. Buckland*, 15 M. & W. 346, 353, 354, per Pollock, C. B.

(*e*) *Ross v. Clifton*, 11 A. & E. 631; 1 G. & D. 72; 9 Dowl. 1033, S. C.; *Maund v. Monmouth Can. Co.*, C. & Marsh. 606, 608, per Cresswell, J., stating the general opinion of the judges; *Fisher v. Thames Junct. Rail. Co.*, 5 Dowl. 773; *Haine v. Davey*, 4 A. & E. 892; 6 N. & M. 356, S. C.; *Eagleton v. Gutteridge*, 11 M. & W. 469, per Parke, B.

(*f*) *Williams v. Jones*, 11 A. & E. 643.

(*g*) *Tharpe v. Stallwood*, 5 M. & Gr. 768, per Cresswell, J.

(*h*) Reg. Gen. H. T. 4 Will. 4, reg. 5, 5 B. & Ad. iii.; *Neale v. McKenzie*,

doubt exists as to whether the defendant, in regard to the particular act complained of, is entitled to plead not guilty by statute, the Court will sometimes relax the rule, and allow him to plead specially in addition to that plea, on the ground that rules should not be made for very nice cases, and that the acts, which confer this right on defendants, should be liberally and benignantly expounded (i).

§ 236. The statutes enabling persons, who act in pursuance thereof, to plead the general issue, and to give special matter in evidence under such plea, are extremely numerous, and, although laborious attempts have been made to enumerate them, no list approaching to accuracy has yet been published (j). The pleader, therefore, is left to his own resources to discover in what cases the defendant may or may not avail himself of such plea; but he should remember that, by the act of 5 & 6 Vict., c. 97, §. 3, so much of any clause or provision in any act commonly called Public local and personal, or Local and personal, or in any act of a local and personal nature (k), whereby any party was entitled, before the 10th of August, 1842, to give special matter in evidence under the general issue, is repealed.

§ 237. The rule confining evidence to the points in issue, not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings; but limits the *mode* of proving even the issues themselves. Thus, it excludes all evidence of *collateral facts*, which are incapable of affording any reasonable presumption as to the principal matters in dispute; and the reason is, that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead; moreover, the adverse party, having had no notice of such evidence, is not prepared to rebut

1 C. M. & R. 61; 4 Tyrwh. 670; 2 Dowl. 702, S. C.; Fisher v. Thames Junct. Rail. Co., 5 Dowl. 773; Ross v. Clifton, 11 A. & E. 631; 1 G. & D. 72; 9 Dowl. 1033, S. C.

(i) Langford v. Woods, 8 Scott, N. R. 369; 7 M. & Gr. 625, S. C.

(j) An extremely inaccurate list is given in Lutwyche on Plead. Gen. Issue, p. 4—16.

(k) As to the meaning of this phrase, see Richards v. Easto, 15 M. & W. 244; Cock v. Gent, 12 M. & W. 234.

it. The most important class of facts, which are thus excluded, are the acts and declarations, either of strangers, or of one of the parties to the suit in his dealings with strangers. These, which in the technical language of the law are denominated *res inter alios actæ*, it would be manifestly unjust to admit, since the conduct of one man under certain circumstances, or towards certain individuals, varying as it will necessarily do, according to the motives which influence him, the qualities he possesses, and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behaviour of another man similarly situated, or of the same man towards other persons.

§ 238. The application and extent of this rule will be best understood by referring to a few of the leading decisions on the subject. In an action of trover brought against the creditor of a bankrupt by the assignees, the goods in dispute were sought to be recovered on the ground that, before they came into the hands of the defendant, acts of bankruptcy had been committed; and the plaintiffs endeavoured to prove these acts, by showing the prior delivery of other goods to various creditors, who, after the fiat had issued, had returned them to the assignees; but the Court were of opinion that the conduct of these creditors in returning the goods could not affect the title of the defendant. The only way in which their conduct bore upon the case, was by showing their conviction that they had received the goods under circumstances, which did not entitle them to keep possession; and as their opinions, expressed after the fiat, could not have been received, evidence of their acts, adduced for the purpose of raising an inference respecting the previous intentions, either of themselves or of the bankrupt, were equally inadmissible (*l*). So, where the question between landlord and tenant was, whether the rent was payable quarterly or half-yearly, evidence of the mode in which other tenants of the same landlord paid their rent was rejected (*m*); and where it was necessary for a brewer to prove that he had supplied a publican with good beer, other publicans were not allowed to show that, during the same period as the dealing in question, he had furnished them

(*l*) *Backhouse v. Jones*, 6 Bing. N. C. 65; 8 Scott, 148, S.C.

(*m*) *Carter v. Pryke*, Pea. R. 95, per Lord Kenyon.

with beer of an excellent quality, for a man may deal well with some of his customers, though not with others (*n*). In another case, where the point in issue was whether the plaintiff's scholars were ill-fed, a witness was not allowed to be asked as to the comparative quality of the provisions supplied by the plaintiff, with those consumed in a *particular* school, where the witness was educated, though evidence would be admissible to show the general treatment of boys at schools (*o*). Again, in an action of assumpsit against a married woman, where the issue was, in part, whether the defendant had represented herself to the plaintiff as a feme sole, and whether he had dealt with her believing her to be such, it was held that evidence of the defendant's dealings with other tradesmen could only be admissible, if at all, on the ground that she had held herself out to them as a single woman, in such a manner as to reach the plaintiff's ears (*p*). So, also, in an action brought by the indorsee against the acceptor of a bill, where the defence was that the acceptance was a forgery, evidence that a collection of bills, on which the defendant's acceptance was forged, had been in the plaintiff's possession, and that some of them had been circulated by him, was rejected, there being no distinct proof that the bill in question had *ever formed part of that collection* (*q*).

§ 239. These last words it is important to notice, since they point out an *exception* to the rule under discussion, in favour of the admissibility of facts which, though collateral, are proved to be *connected* by some general link with the matter in issue. This exception has been recognised in numerous cases. Thus, there is no rule better established, or more frequently acted upon than this, that the *customs* of one *manor* cannot be given in evidence

(*n*) *Holcombe v. Hewson*, 2 Camp. 391, per Lord Ellenborough.

(*o*) *Boldron v. Widdows*, 1 C. & P. 65, per Abbott, C. J.

(*p*) *Barden v. Keverberg*, 2 M. & W. 61. See *Smith v. Wilkins*, 6 C. & P. 180, where, the question being whether credit was given to defendant's wife or to her father, evidence that other tradesmen had given credit to the father was properly rejected by Tindal, C. J. Also *Delamotte v. Lane*, 9 C. & P. 261.

(*q*) *Griffiths v. Payne*, 11 A. & E. 131; 3 P. & D. 107, S.C.; *Thompson v. Mosely*, 5 C. & P. 502, per Lord Lyndhurst; *Viney v. Barss*, 1 Esp. 293, per Lord Kenyon; *Balcetti v. Serani*, Pea. R. 142, per Buller, J. Such evidence would be clearly inadmissible in an indictment for forgery, per Lord Denman, 11 A. & E. 133.

to prove the customs of another ; because, as each manor may have customs peculiar to itself, to admit the peculiar customs of another manor in order to show the customs of the manor in question, would be a very false guide for the purpose of leading to any sound conclusion, and would, in fact, put an end to all question as to the peculiar customs in particular manors, by throwing them open to the customs of all surrounding manors (*r*). Still, such customs become evidence the moment that a foundation has been laid for their admission, by clear proof of a sufficient connexion between the two manors. The mere fact, indeed, that the two lie within the same parish and leet, will not be sufficient ; nor even that the one was a subinfeudation of the other ; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs (*s*). If, however, it can be satisfactorily proved that the customs in the two manors are identical, or that the one was derived from the other after the time of Richard the First, then the customs of each will respectively become evidence (*t*) ; and so, also, if the customs in question be a particular incident of the general tenure which is proved to be common to the two manors, evidence may be given of what the custom of the one is as to that tenure, for the purpose of showing what is the custom of the other as to the same (*u*). For instance, prove in a particular manor that borough English or gavelkind prevails, and then you may see from other manors what are the peculiarities of these tenures (*v*).

§ 240. The manors on the border between England and Scotland (*w*), and those in the mining districts of Derbyshire and Cornwall, will furnish other examples of the application of this rule ; since, throughout the former, a particular species of tenure, called

(*r*) *Marq. of Anglesey v. Lord Hatherton*, 10 M. & W. 235, per Lord Abinger ; *Furneaux v. Hutchins*, 2 Cowp. 807 ; *Doe v. Sisson*, 12 East, 62.

(*s*) *Marq. of Anglesey v. Lord Hatherton*, 10 M. & W. 218.

(*t*) *Marq. of Anglesey v. Lord Hatherton*, 10 M. & W. 242, 243, per Alderson, B.

(*u*) *Id.* ; *Stanley v. White*, 14 East, 338, 341, 342, per Lord Ellenborough ; *R. v. Ellis*, 1 M. & Sel. 662, per *id.* ; *Duke of Somerset v. France*, 1 Str. 662 ; *Champion v. Atkinson*, 3 Keb. 90, explained by Rolfe, B., in 10 M. & W. 246, 247.

(*v*) *Marq. of Anglesey v. Lord Hatherton*, 10 M. & W. 246, per Rolfe, B.

(*w*) *Rowe v. Parker*, 5 T. R. 31, per Lord Kenyon.

tenant-right, and in the latter particular customs, as to the rights of the miners and the rights to the minerals, prevail; and consequently, if in one of these manors no example can be adduced of what is the custom in any particular case, it is only reasonable that, in order to explain the nature of the tenure or right in question, which is not confined to a single manor, but prevails equally in a great number, evidence should be admissible to show what is the general usage with respect to that tenure or right (*x*). Thus, where in each of several manors belonging to the same lord, and part of the same district, it appeared that there was a class of tenants called *assessional* tenants, to whom their tenements were granted by similar words, evidence of the rights enjoyed by those tenants in one manor was held admissible, to show the extent of their rights in another (*y*). This last case, indeed, raised no question as to *manorial* title; for had there been no manor at all, precisely the same evidence would have been admissible, provided the land had been all held under the assessional tenure (*z*).

§ 241. So, again, upon a question whether the Crown, in right of the Duchy of Lancaster, had the exclusive privilege, under the original charter, granted to Henry Duke of Lancaster in the year 1349, of appointing a coroner within the honour of Pontefract, evidence of appointments of coroners, and of their acting, in other parts of the duchy, out of the honour of Pontefract, was held admissible (*a*). On the same principle, the mode of conducting a particular branch of trade in one place, has been proved by showing the manner in which the same trade is carried on in another place (*b*); and where the dispute at the trial was as to the exact line of boundary between the manors of Wakefield and Rochdale, which the plaintiff contended was the ridge of a mountain, whence the waters descended in opposite directions, he was allowed to prove, in support of this view, that the ridge of the *same range* of hills separated the manor of Rochdale from another manor which

(*x*) *Marq. of Anglesey v. Lord Hatherton*, 10 M. & W. 237, per Lord Abinger.

(*y*) *Rowe v. Brenton*, 8 B. & C. 758; 3 M. & Ry. 361, S.C.

(*z*) Per Lord Abinger, in *Marq. of Anglesey v. Lord Hatherton*, 10 M. & W. 237, 238.

(*a*) *Jewison v. Dyson*, 9 M. & W. 540. (*b*) *Noble v. Kennaway*, 2 Doug. 510.

adjoined the manor of Wakefield; because, this being a *natural* boundary, which was equally suitable in both cases, it was highly improbable that it should have been varied (c).

§ 242. In like manner it has been held, upon a question whether a slip of waste land, lying between the highway and the inclosed lands of the plaintiff, belonged to him or to the lord of the manor, that the lord might give evidence of acts of ownership on other parts of the waste land between the *same* road and the inclosures of other persons, although at the distance of two miles from the piece in dispute, and although the continuity of the waste was interrupted for the space of some sixty or seventy yards, by the intervention of a bridge and some old houses (d). So, where, in trespass, the object of the plaintiff was to prove himself the owner of the entire bed of a river flowing between his land and that of the defendant, and thus to rebut the presumption that each party was entitled *ad medium flum aquæ* (e), he was allowed to give in evidence acts of ownership exercised by himself upon the bed and banks of the river on the defendant's side, lower down the stream, where it flowed between the plaintiff's land and the farm of a third party, adjoining the defendant's property; as also repairs which he had done, beyond the limits of the defendant's land, to a fence which, dividing that and other land from the river, ran along the side of the stream for a considerable distance, till it came opposite to the extremity of the plaintiff's property on the other side (f).

(c) *Brisco v. Lomax*, 8 A. & E. 198; 3 N. & P. 388, S.C.

(d) *Doe v. Kemp*, 7 Bing. 332; 2 Bing. N. C. 102; 2 Scott, 9, S.C., recognised by Parke, B., in *Jones v. Williams*, 2 M. & W. 327, 328. (e) *Ante*, § 120.

(f) *Jones v. Williams*, 2 M. & W. 326. The observations of Parke, B., in this case are so pertinent, that no apology is necessary for introducing them here at length. "I am also of opinion that this case ought to go down to a new trial, because I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and, consequently, the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed: *evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference*

§ 243. The same principle applies with increased force to the case of mines, because it is not possible that the lessees of minerals, lying under an extensive district, can enter upon, and take actual possession of, every part of that which forms the subject of demise, and, moreover, the mode of occupying a mine cannot afford the same evidence of possession as the occupation of the surface, the produce of which is from time to time consumed and renewed. When one is taken, it is gone for ever. Evidence, therefore, of working under one part of the surface is, under a demise of all mines and minerals lying beneath a large continuous tract of waste land, evidence of possession of the entire subject of demise (g).

§ 244. In these, and the like cases, it is for the judge to decide (h),

in the minds of the jury, that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person: though it by no means follows, as a necessary consequence, for different persons may have balks of land in the same inclosure; but this is a fact to be submitted to the jury. So I apprehend the same rule is applicable to a wood which is not inclosed by any fence: if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary, surrounding the whole; and the case of *Stanley v. White*, 14 East, 332, I conceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person, by showing acts of ownership on his part along the same fence. It has been said, in the course of the argument, that the *defendant had no interest to dispute the acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party: they are admissible of themselves proprio vigore, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight.* That observation applies only to the effect of the evidence. Applying that reasoning to the present case, surely the plaintiff, who claims the whole bed of the river, is entitled to show the taking of stones, not only on the spot in question, but all along the bed of the river, which he claims as being his property; and he has a right to have that submitted to the jury. The same observation applies to the fence and the banks of the river. What weight the jury may attach to it, is another question. The principle is the same as that which is laid down in *Doe v. Kemp*."—pp. 331, 332.

(g) *Taylor v. Parry*, 1 M. & G. 604, 615, per Tindal, C. J.; 1 Scott, N. R. 576, S. C.

(h) *Doe v. Kemp*, 7 Bing. 336, per Bosanquet, J.; ante, § 21.

whether such an unity of character exists between the spot in dispute, and the parcel of land over which acts of ownership have been exercised, as to lead to the fair inference that both are subject to the same rights, and constitute in fact but parts of an entire property. If no such inference can be raised, evidence of acts done beyond the limits of the locus in quo will be inadmissible. Thus, where it was attempted to connect parcels of waste land with each other, merely by showing that they all lay within the same manor, and between inclosures and public roads, it was held that evidence of acts of ownership over some of these lands was inadmissible to prove title to the others (i).

§ 245. This rule, limited in the manner above stated, is founded on common sense and common justice, and applies with even greater force to *criminal* than to civil proceedings; for one of the chief objects of an indictment being, to afford distinct information to the prisoner of the specific charge which is about to be brought against him, the admission of any evidence of facts unconnected with that charge, would be clearly open to the serious objection of taking the prisoner by surprise. No man should be bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best of men would choose to submit to such an ordeal (j). If, therefore, on an indictment for burglariously entering a house on a certain

(i) *Doe v. Kemp*, 2 Bing. N. C. 102. Lord Denman, in giving judgment, observes:—"If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another, in the same manor, although both may be similarly situated with respect to the highway; assuming that all were originally the property of the same person, as the lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands, that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to private individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with respect to those parcels, which, from their local situation, may be deemed parts of one waste or common; acts of ownership in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common."—pp. 107, 108. See also *Tyrwhitt v. Wynne*, 2 B. & A. 554; *Hollis v. Goldfinch*, 1 B. & C. 218, 219, per Bayley, J.

(j) *Foster*, 246.

day and stealing goods therein, the prosecutor fail in proving that the entry was by night, or that any larceny was on that occasion committed, he cannot abandon the charge of burglary, and then proceed to show that the prisoner stole some of the articles mentioned in the indictment on a previous occasion; because, though time is not usually a material allegation, yet the prisoner, having been led to suppose that he was to meet a charge of burglary, cannot be expected to come prepared to prove his innocence with respect to a distinct offence, committed, if at all, at a different time (*k*). So, an admission by the prisoner, that he has, at another time, committed an offence, similar to that with which he is charged, and that he has a tendency to perpetrate such crimes, cannot be received (*l*); and, in treason, no overt act amounting to a distinct independent charge, though falling under the same head of treason, can be given in evidence, unless it be either expressly laid in the indictment, or be direct proof of any of the overt acts which are laid (*m*). Thus, on an indictment for adhering to the King's enemies on the high sea, where the overt act laid was the prisoner's cruising on the King's subjects in a vessel called the *Loyal Clencarty*, evidence that he had some time before cut away the custom-house barge, and gone a cruising in her, was rejected (*n*).

§ 246. But when felonies are so connected together as to form part of one entire transaction, evidence of one may be given to show the character of the other (*o*). Thus, where a shopboy was indicted for robbing his mistress of six shillings, and it was proved that on one occasion, when the till contained some marked silver and other money amounting in all to 12*s. 6d.*, the prisoner went to it, and it was afterwards found to contain 11*s. 6d.* only, the prosecutrix was allowed to show that, on subsequent examinations of the till, the money was perceived to have gradually diminished, and

(*k*) *R. v. Vandercomb*, 2 *Lea*. 708; *East*, P. C. 519, S. C.

(*l*) *R. v. Cole*, 1 *Ph. Ev.* 477, by all the judges.

(*m*) 7 *Will.* 3, c. 3, § 8, as explained by Sir M. Foster, in his work on Crown Law, p. 245; citing *Ambrose Rookwood's case*, 13 *How. St. Tr.* 139; *Lowick's case*, *id.* 267; *Layer's case*, 16 *id.* 93; *Deacon's case*, 18 *id.* 365; *Foster*, 9, S. C.; and *Wedderburne's case*, 18 *id.* 425; *Foster*, 22, S. C.

(*n*) *Vaughan's case*, 13 *How. St. Tr.* 485; *Foster*, 246.

(*o*) *R. v. Ellis*, 6 *B. & C.* 147, 148, per Bayley, J.

that, on the prisoner being searched, 8*s.* of the marked money was found on his person; for, although each taking was a separate felony, they were all so connected together, as mutually to illustrate and prove each other (*p*). So, where a man committed three burglaries in one night, and left at one of the houses property taken from another, the three felonies were considered so connected, that the Court heard the history of them all (*q*); and the same course was adopted where the prisoner was charged on three indictments for firing three stacks belonging to separate parties, and it appeared that the stacks, being within sight of each other, were fired about the same time (*r*).

§ 247. In immediate connection with this subject, though not strictly a question of evidence, may be noticed the *doctrine of election*. In point of law, no objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind (*s*). Indeed, on the face of the record, every count purports to be for a separate offence (*t*), and, in misdemeanors, it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment (*u*). In cases of felony, however, this rule has, from motives of humanity, been considerably modified; for, as an indictment containing several distinct charges is calculated to embarrass a prisoner in his defence, the judges, in the exercise of a sound discretion, are accustomed to quash indictments so framed, whenever it appears, before the prisoner has pleaded and the jury are charged, that the inquiry is to include separate crimes. When

(*p*) *R. v. Ellis*, 6 B. & C. 145.

(*q*) Cited by Lord Ellenborough in *R. v. Wylie*, 1 N. R. 94; 2 Lea. 985, S. C.; *R. v. Stonyer*, 2 Russ. C. & M. 775, per Wightman, J. See also *Alison*, Cr. L. 313, 314, and *Wills Circum. Ev.* 68—71, for remarkable cases of a similar nature, which occurred in Scotland.

(*r*) *R. v. Long*, 6 C. & P. 179, per Gurney, B.

(*s*) *R. v. Kingston*, 8 East, 41; *R. v. Jones*, 2 Camp. 132, per Lord Ellenborough. As to election in civil cases, see *Howard v. Newton*, 2 M. & Rob. 509.

(*t*) *Young v. R.*, 3 T. R. 106, per Buller, J.; 1 Lea. 511, S. C.

(*u*) *R. v. Jones*, 2 Camp. 132, per Lord Ellenborough; *R. v. Levy*, 2 Stark. R. 458. See also *R. v. Finacane*, 5 C. & P. 551; *R. v. Collier*, id. 160.

this circumstance is discovered during the progress of the trial, the prosecutor is usually called upon to select one felony, and to confine himself to that, unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction. Here, such a course will not be pursued, as its adoption would defeat the ends of justice (*v*). Thus, if a prisoner is charged with stealing or receiving several articles, and it be proved that they were taken or received at separate times, the prosecutor may be put to his election, but if it be possible that all the goods may have been stolen or received at one time, he cannot be compelled to abandon any part of his accusation (*w*). So, where several prisoners were charged in different counts of the same indictment with committing successive rapes upon the prosecutrix, and aiding each other in turn, she was not put to her election, but the Court heard the history of the whole transaction (*x*); and a similar course was adopted, where an indictment contained five counts for setting fire to five houses belonging to different owners, and it appeared that the houses were in a row, and that one fire burnt them all (*y*). So, where an indictment, in the same count, charged four prisoners with assaulting and robbing two persons, who, it appeared, were walking together at the time when they were attacked, Chief Justice Tindal refused to put the prosecutors to elect upon which felony they would rely, and evidence being given as to the entire transaction, the prisoners were convicted (*z*). In another case, the defendant was charged in a single count with uttering *twenty-two* forged receipts, which were severally set out and purported to be signed by different persons, with intent to defraud the King. His counsel contended that the prosecutor ought to elect upon which of these receipts he would proceed, as, amidst such a variety, it would be almost impossible for the prisoner to conduct his defence. As, however, the indictment alleged that they were all uttered at one and the same time, and the proof corresponded with this

(*v*) *Young v. R.*, 3 T. R. 106, per Buller, J.; *R. v. Levy*, 2 Stark. R. 458; *R. v. Birdseye*, 4 C. & P. 386. See also *Anon.*, Ir. Cir. Rep. 165, 167, n. (*a*).

(*w*) *R. v. Dunn*, 1 Moo. C. C. 146; *R. v. Hinley*, 2 M. & Rob. 524, per Maule, J.

(*x*) *R. v. Folkes*, 1 Moo. C. C. 354; *R. v. Gray*, 7 C. & P. 164; *R. v. Parry*, id. 836.

(*y*) *R. v. Trueman*, 8 C. & P. 727.

(*z*) *R. v. Giddins*, C. & Marsh. 634.

allegation, the Court refused to interfere, and all the judges subsequently held that a proper discretion had been exercised (*a*).

§ 248. In the case of embezzlement by clerks and servants, the legislature has expressly provided, that distinct acts, not exceeding three, may be charged in one indictment, if they have been committed against the same master, and within the period of six calendar months from the first to the last of such acts (*b*); this exception being suggested by the difficulty which was felt in procuring a conviction, where the inquiry was confined to one offence. Still, if the prosecutor, disregarding the statute, indict his servant for a single act of embezzlement, he must confine his evidence to that alone, and, if it appear that the prisoner received different sums on different days, he must elect one sum and one day on which to proceed (*c*).

§ 249. The *time* for putting the prosecutor to his election is, when it shall appear by the *evidence* that the two or more supposed occurrences took place at different periods, and it is not sufficient for this purpose that the counsel for the crown, in his opening address, has stated that the fact was so, because the witnesses, on being examined, may put the matter in a different light (*d*).

§ 250. Upon the same principle, that collateral facts are only excluded, when they cannot raise any fair inference respecting the matter in issue, evidence of other offences committed by the prisoner is sometimes admitted, with the view either of establishing his *identity*, or of *corroborating* the testimony of a witness in some material particular. Thus, on an information for a libel, where the printer swore that he received the manuscript from the defendant and had returned it to him, and notice had been given to the defendant to produce it, other libels written by him concerning the same subject, were received by Lord Kenyon, as evidence to corroborate the statement of the printer (*e*). So, where the prisoner was

(*a*) *R. v. Thomas*, 2 Lea. 877; 2 East, P. C. 934, S.C.

(*b*) 7 & 8 Geo. 4, c. 29, § 48.

(*c*) *R. v. Williams*, 6 C. & P. 626.

(*d*) *R. v. Smart*, Ir. Cir. Rep. 15, per Bushe, C. J.

(*e*) *R. v. Pearce*, Pea. R. 75.

charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of a similar, but ineffectual attempt on the following evening, when the prisoner brought the duplicate pawn ticket for the coat, and which ticket was found on his person at the time of his apprehension, was held admissible, as confirmatory of the truth of the prosecutor's evidence respecting what occurred on the former day (*f*). So, on a charge of highway robbery, the prosecutor was allowed to rebut an alibi, by proving that, shortly before the attack made upon him, and near the same spot, the prisoner had robbed another person (*g*); and even had no such defence been set up, similar evidence would, it seems, be admissible, as showing at least that the prisoner was in the neighbourhood at the time when the crime was committed (*h*).

§ 251. In civil causes, too, evidence of collateral facts is sometimes received for the purpose of confirming the testimony of witnesses. For instance, where a party was sued on a bill of exchange, which had been accepted in his name by another person, and evidence had been given that this person had a general authority from the defendant to accept bills in his name, the Court held, that an admission by the defendant of his liability on another bill so accepted, was receivable in evidence, in order to confirm the witness who had spoken to the general authority (*i*).

§ 252. Another *exception* to the rule excluding evidence of collateral facts is recognised, where the question is a *matter of science*, and where the facts proved, though not directly in issue, tend to *illustrate the opinions* of scientific witnesses. Thus, where the point in dispute was whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time as the harbour in question, was admitted, as

(*f*) *R. v. Egerton*, R. & R. 375, cited by Holroyd, J. in *R. v. Ellis*, 6 B. & C. 148.

(*g*) *R. v. Briggs*, 2 M. & Rob. 199, per Alderson, B.

(*h*) *R. v. Rooney*, 7 C. & P. 517, per Littledale, J. See also *R. v. Fursey*, 6 C. & P. 81, per Parke and Gaselee, Js.

(*i*) *Llewellyn v. Winckworth*, 13 M. & W. 598.

such evidence served to elucidate the reasoning of the skilled witnesses (*j*).

§ 253. In some cases evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connexion with it; and, consequently, their admission might seem, at first view, to constitute another exception to this rule. But in these cases the *knowledge* or *good faith* or *intent* of the party was a material fact, on which the evidence, apparently collateral, and foreign to the main subject, had a direct bearing. The admission therefore of such evidence, instead of being an exception to the rule, falls strictly within it. Thus, where the question was, whether the acceptor of a bill of exchange either knew that the name of the payee was fictitious, or else had given to the drawer a general authority to draw bills on him payable to fictitious persons, evidence was admitted to show that he had accepted other bills, drawn in like manner, before it was possible to have transmitted them from the place at which they bore date (*k*). So, in an action for work and labour in fixing railings to certain houses belonging to the defendant, where the defence was that the plaintiff had given credit to a third person by whom the houses were built under a contract, the builder was allowed to state that the order was given by him on his own account, and not as agent for the defendant; and that the defendant had actually paid him for the building of the houses, including the charge for the railings. This evidence of payment was objected to, but the Court held that it was clearly admissible, as tending to show the bona fides of the defence (*l*).

§ 254. In actions for defamation, other words written or spoken by the defendant either before (*m*) or after those declared upon, or

(*j*) *Folkes v. Chadd*, 3 Doug. 157.

(*k*) *Gibson v. Hunter*, 2 H. Bl. 288.

(*l*) *Gerish v. Chartier*, 1 Com. B. 13.

(*m*) *Long v. Barrett*, 7 Ir. Law R. 439; *Barrett v. Long*, 8 Ir. Law R. 331; affirming the former case in the Ex. Ch. That was an action of libel, to which the defendant pleaded not guilty, and a special plea framed on § 2 of 6 & 7 Vict. c. 96. The plaintiff, to show the animus of the defendant, tendered in evidence other libels published by him against the plaintiff six years before, and the Court held that they were admissible, the jury having been cautioned not to give damages respecting them.

even after issue joined (*n*), are, under the general issue, admissible as evidence of *actual malice* or of *deliberate publication* (*o*); and for this purpose it makes in general no difference, whether the language on which the action is founded be equivocal or clear (*p*); whether the collateral words tendered in evidence be addressed to the same party, to whom the slander is alleged in the declaration to have been spoken, or to a stranger (*q*); or whether those words be themselves actionable or not (*r*). The case of *Warwick v. Foulkes* (*s*) will illustrate this doctrine. That was an action of trespass for false imprisonment, to which the defendant pleaded first, not guilty, and secondly, a justification, alleging that the plaintiff had

(*n*) *Pearson v. Le Maitre*, 6 Scott, N. R. 607; 5 M. & Gr. 700, S. C. In that case a letter was admitted, written subsequently to the commencement of the action, and fourteen months after the libel complained of. See also *Macleod v. Wakley*, 3 C. & P. 311, where the paragraph admitted by Lord Tenterden was published only two days before the trial; and *Plunkett v. Cobbett*, 5 Esp. 136, where, the defendant being the editor of a weekly periodical, proof that a copy of the paper containing the libel was sold after action brought, was admitted by Lord Ellenborough as evidence of deliberate publication.

(*o*) *Pearson v. Le Maitre*, 6 Scott, N. R. 607; 5 M. & Gr. 700, S. C.; *Barwell v. Adkins*, 1 M. & Gr. 807; 2 Scott, N. R. 11, S. C.; *Perkins v. Vaughan*, 4 M. & Gr. 988; *Rustell v. Macquister*, 1 Camp. 49, n., per Lord Ellenborough; *Charlter v. Barret*, Pea. R. 22, per Lord Kenyon; *Lee v. Huson*, id. 166, per id.; *Scott v. Lord Oxford*, id. 3rd ed. 170, n. (*α*), per Lawrence, J.; B. N. P. 7; *Delegal v. Highley*, 8 C. & P. 444, per Tindal, C. J.; *Jackson v. Adams*, 2 Scott, 599.

(*p*) See note (*r*), post.

(*q*) *Pearson v. Le Maitre*, 6 Scott, N. R. 607; 5 M. & Gr. 700, S. C.; *Mead v. Daubigny*, Pea. R. 125, per Lord Kenyon.

(*r*) *Pearson v. Le Maitre*, 6 Scott, N. R. 607; 5 M. & Gr. 700, S. C., questioning *Pearce v. Ornsby*, 1 M. & Rob. 455, and *Symmons v. Blake*, id. 477. Tindal, C. J., in pronouncing the judgment of the Court, observes that the correct rule is this, viz., "That either party may, with a view to damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose establishes another cause of action, the jury shall be cautioned against giving any damages in respect of it; and if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. And perhaps the cases of *Pearce v. Ornsby* and *Symmons v. Blake* went no farther than this. * * Upon principle, we think, that the *spirit and intention* of the party publishing a libel are fit to be considered by a jury, in estimating the injury done to the plaintiff, and that evidence tending to prove them cannot be excluded, simply because it may disclose another and different cause of action." 5 M. & Gr. 719, 720. See also *Rustell v. Macquister*, 1 Camp. 49, n., where Lord Ellenborough remarked, that the distinction between words actionable and not actionable was not founded on any principle. (*s*) 12 M. & W. 507.

committed a felony. This last plea was abandoned and apologised for at the trial ; but the Court held that, in estimating the damages under the first issue, the jury might take into account the fact of a justification having been pleaded, because the placing such a plea on the record was a persisting in the charge, which, under the circumstances, was strong evidence of malice. If, however, to an action for a libel the defendant were to plead not guilty and a justification, the jury, in forming an opinion, under the first issue, whether or not the communication was privileged, should not take into consideration the circumstance, that the justification had been pleaded and abandoned (*t*). So, if it clearly appear that other libels are offered in evidence, merely with the view of unfairly recovering damages for the injury sustained by *their* publication, they will properly be rejected (*u*) ; and it seems that no subsequent libels will be admitted, unless they directly refer to the defamatory language set out in the declaration, or at least relate to the same subject-matter (*v*). Not only is other defamatory matter admissible for the purpose of showing the animus of the defendant, but the *mode* in which such matter was published may also be highly material ; as, for instance, if printed placards were sent to the plaintiff's house, or paraded before his door (*w*).

§ 255. On the same principle the defendant, in mitigation of damages, has been allowed, under the general issue, to give evidence palliating, though not justifying, his act of publishing a libel, as, for instance, that he copied it from another newspaper (*x*), or that

(*t*) *Wilson v. Robinson*, 7 Q. B. 68.

(*u*) See cases cited in note (*r*), ante ; *Stuart v. Lovell*, 2 Stark. R. 95 ; *Defries v. Davis*, 7 C. & P. 112.

(*v*) *Finnerty v. Tipper*, 2 Camp. 72, per Sir J. Mansfield.

(*w*) *Bond v. Douglas*, 7 C. & P. 626, per Lord Abinger.

(*x*) *Saunders v. Mills*, 6 Bing. 213, cited by Tindal, C. J., in *Pearson v. Le Maitre*, 5 M. & Gr. 719. In *Talbutt v. Clark*, 2 M. & Rob. 312, Lord Denman would not permit the editor of a newspaper to show, in mitigation of damages, that the libel was published on the communication of a correspondent ; and referring to a case in the Common Pleas, which was probably *Saunders v. Mills*, his Lordship observed, that "that decision had been very much questioned." However, by the recognition of *Saunders v. Mills*, in *Pearson v. Le Maitre*, the case of *Talbutt v. Clark* would seem to be indirectly overruled. See also *East v. Chapman*, M. & M. 46 ; 2 C. & P. 570, S. C., per Abbott, J. C. ; *Charlton v. Watson*, 6 C. & P. 385, per Patteson, J. ; *Creevy v. Carr*, 7 C. & P. 64.

he had been *provoked* to act as he had done by the conduct of the plaintiff, who had previously published libels of him respecting the same subject-matter; but in this last case some proof must be given that the libels published by the plaintiff had first come to the knowledge of the defendant (*y*), since they are not admissible, on the ground of any right to set off one libel against another (*z*), but simply from an indulgent consideration of the weakness of human nature, which leads a man, when his feelings are exasperated, to say "that he should be sorry for."

§ 256. Evidence of this kind is very frequently admitted in criminal proceedings. Thus, on an indictment for knowingly uttering a forged document, or a counterfeit bank note, proof of the possession, or of the prior or subsequent (*a*) utterance, of other false documents or notes, though of a different description (*b*), and though themselves the subjects of separate indictments (*c*), is admissible as material to the question of *guilty knowledge* or *intent* (*d*); but in these cases it is essential to prove distinctly that

(*y*) *Watts v. Fraser*, 7 A. & E. 223; 7 C. & P. 369, S. C.; *Tarpley v. Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; 7 C. & P. 395, S. C.; *May v. Brown*, 3 B. & C. 113; 4 D. & R. 670, S. C.; *Wakley v. Johnson*, Ry. & M. 422; *Finnerty v. Tipper*, 2 Camp. 72. See *Richards v. Richards*, 2 M. & Rob. 557.

(*z*) *Watts v. Fraser*, 7 C. & P. 370, per Lord Denman. In *Judge v. Berkeley*, which was an action of assault, Burrough, J., allowed the defendant, in mitigation of damages, to prove a series of libellous articles published respecting him by the plaintiff, one of which appeared on the day of the assault, cited *id.* 371, note (*a*).

(*a*) Perhaps evidence of subsequent utterings would not be admissible, unless the notes were of the *same manufacture*; *R. v. Taverner*, Carr. Supp. 195; 4 C. & P. 413, note (*a*), S. C.; *R. v. Smith*, 4 C. & P. 411; and even in such case some doubt exists on the subject.

(*b*) *R. v. Harris*, 7 C. & P. 429, by all the judges. Doubts had been entertained on this subject by some of the judges, in *R. v. Millard*, R. & R. 245, but the evidence was admitted in *Sunderland's*, *Hodgson's*, *Kirkwood's*, and *Martin's* cases, 1 Lew. C. C. 102—104. The same evidence is admissible in Scotland; *Alison*, Cr. L. 420.

(*c*) *R. v. Hough*, R. & R. 122; *Kirkwood's case*, 1 Lew. C. C. 103, per Littledale, J.; *Martin's case*, *id.* 104, per *id.*; *R. v. Aston*, 2 Russ. C. & M. 407, per Alderson, B.; *R. v. Lewis*, *id.*, per Lord Denman, who observed that "he could not conceive that the relevancy of the fact to the charge could be affected by its being the subject of another charge." *Contrà*, *R. v. Smith*, 2 C. & P. 633, per Vaughan, B.

(*d*) *R. v. Wylie*, 1 New Rep. 92, 94; 2 Lea. 983, S. C., nom. *R. v. Whiley*; *R. v. Ball*, 1 Camp. 324; R. & R. 132, S. C.

the instruments offered in evidence of guilty knowledge were themselves forged (*e*). It seems, also, that though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, he cannot proceed to show what the prisoner said or did at another time, with respect to such uttering; for these are collateral facts, too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by possibility be prepared to contradict (*f*). On indictments for knowingly uttering counterfeit coin, evidence of possession of other bad money, or of other utterings about the same time, is admissible (*g*); and the same laxity of evidence is allowed in all other criminal charges, where the collateral facts have a tendency to establish the guilty knowledge or intent, which constitutes a necessary ingredient of the crime. For instance, on an indictment against a receiver, the fact that the prisoner has at various times received and pledged other property, stolen from the prosecutor, is some evidence of his being aware that the articles mentioned in the indictment had been stolen (*h*); on a charge of sending a threatening letter, other letters written by the prisoner, both before and after the one in question, are admissible to explain that letter (*i*); on an indictment for malicious shooting, if it be doubtful whether the shot was fired by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person (*j*); and in indictments for murder, while evidence of former menaces or quarrels will have an important tendency towards supporting the legal inference of malice, proof of expressions of kindness or of friendly acts towards the deceased will be entitled to equal weight as raising a counter-presumption (*k*).

§ 257. In like manner, on an indictment for a robbery, where

(*e*) *R. v. Millard*, *R. & R.* 245.

(*f*) *R. v. Phillips*, 1 *Lew. C. C.* 105, per Bayley, *J.* *Contrà*, *R. v. Forbes*, 7 *C. & P.* 224, per Coleridge, *J.*

(*g*) *R. v. Wylie*, 1 *New Rep.* 95, per Thompson, *B.*; *R. v. Harrison*, 2 *Lew. C. C.* 118, per Taunton, *J.*, and Alderson, *B.* (*h*) *R. v. Dunn*, 1 *Moo. C. C.* 146.

(*i*) *R. v. Robinson*, 2 *East*, *P. C.* 1110, 1112.

(*j*) *R. v. Voke*, *R. & R.* 531. For other examples, see *R. v. Mogg*, 4 *C. & P.* 364; *R. v. Dossett*, 2 *C. & Kir.* 306, per Maule, *J.* (*k*) 1 *Ph. Ev.* 470, 476.

it appeared that the prisoners had formed part of a mob, who went to the prosecutor's house, and that one of the mob had civilly advised him to give them something to prevent mischief, evidence that this mob, in the presence of some of the prisoners, had demanded money at other houses on the same day, was admitted, as tending to prove that the advice was not given *bonâ fide*, but was in reality a polite mode of committing a robbery (*l*). It will be seen that this case differs from those before cited in this respect, that the acts given in evidence were not committed by the prisoners themselves, but only by some of the mob with whom they were connected. The principle, however, is the same; for the law has wisely provided, that where several evil-doers conspire together to effect some unlawful purpose, the acts done by one of the party in furtherance of the common design shall be considered as done by all (*m*).

§ 258. To this rule may be referred the admissibility of evidence respecting the *general character* of individuals. Such evidence is tendered for the purpose either of raising a *presumption* of innocence or guilt, or of affecting the *amount of damages*, or of impeaching or supporting the *veracity* of a witness (*n*); the first object being chiefly confined to criminal prosecutions, and the second, to civil causes, while the third is equally applicable to both modes of procedure. When the point at issue is, whether the accused has committed a particular act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and therefore, in this event alone will the jury be advised to act upon such evidence. The inquiry, too, must be confined, except where the *intention* forms a material ingredient in the offence (*o*), to the *general character* of the prisoner, and must not condescend to *particular facts* (*p*); for although the common reputation, in which a person is held in society, may be undeserved, and the evidence in support

(*l*) *R. v. Winkworth*, 4 C. & P. 444, per Parke, J., with concurrence of Lord Tenterden, Alderson, J., and Vaughan, B.

(*m*) *R. v. Watson*, 32 How. St. Tr. 7; *R. v. Hardy*, 24 id. 704; *R. v. Salter*, 5 Esp. 125; *R. v. Hunt*, 3 B. & A. 566.

(*n*) 2 St. Ev. 303.

(*o*) Ante, § 256.

(*p*) *J'Anson v. Stuart*, 1 T. R. 754, per Buller, J.

of it must, from its very nature, be indefinite, some inference, varying in degree according to circumstances, may still fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or a cruel act. But the mere proof of isolated facts can afford no such presumption. "None are all evil," and the most consummate villain may be able to prove, that on some occasions he has acted with humanity, fairness, or honour. In all cases, too, when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him (*g*); as, for instance, if he be accused of theft, that he has been reputed an honest man;—if of treason, a loyal one. Subject to these observations, evidence of the defendant's general good character is admissible in all prosecutions, whether for felony or misdemeanor (*r*).

§ 259. Although the defendant, from motives of humanity, is allowed this reasonable indulgence, the prosecutor cannot, in the first instance, have recourse to the same loose testimony, as the means of establishing the guilt of the accused; but if, with the view of raising a presumption of innocence, witnesses to character are called for the defence, the counsel for the Crown may then rebut this presumption, by cross-examining the witnesses, either as to particular facts (*s*), or, if they deem it essential, as to the grounds of their belief (*t*). It seems also, that, on principle, evidence of general bad character would, in such case, be admissible, though it is seldom, if ever, resorted to in practice (*u*). If the charge be one of *felony not punishable with death*, and the prisoner call witnesses to character, the prosecutor may prove that he has been previously convicted of felony; but the statute, which allows this course to be adopted, has strangely omitted all mention of capital felonies, and does not apply to misdemeanors (*v*).

(*g*) *Douglass v. Tousey*, 2 Wend. 352.

(*r*) 2 Russ. C. & M. 784.

(*s*) *R. v. Hodgkiss*, 7 C. & P. 298.

(*t*) 2 St. Ev. 304.

(*u*) *Id.*

(*v*) 6 & 7 Will. 4, c. 111, after reciting that by the act of 7 & 8 Geo. 4, c. 28, "provision is made for the more exemplary punishment of offenders, who shall commit *any felony not punishable with death*, after a previous conviction for felony,"

§ 260. As evidence of general character can, at best, afford only a glimmering light, when the question is whether a party has done a certain act or not, its admission for such a purpose is exclusively confined to criminal proceedings, in which it was originally received in *favorem vitæ*; and so strict is this rule, that even upon an information filed in the Exchequer by the Attorney-General, with the view of recovering penalties from the defendant, for keeping false weights, and for offering to corrupt an officer, such evidence was rejected, because proceedings of this kind, though brought in the name of the Sovereign, are considered as civil suits, the Court of Exchequer having no criminal jurisdiction (*w*). So, in an action of ejectment brought by the heir-at-law against a devisee, where the defendant was charged with having imposed a fictitious will on the testator in extremis, he was not permitted to call witnesses to prove his general good character (*x*); and a similar rule was laid down in an action of slander, where the words charged the plaintiff with stealing money from the defendant, though the latter, by pleading truth as a justification, had put the character of the former directly in jeopardy (*y*). It seems, notwithstanding a decision by Lord Kenyon to the contrary (*z*), that, in an action for malicious prosecution, the defendant, in proof of probable cause, cannot give evidence of the plaintiff's notoriously bad character (*a*); and it has

provides, among other things, "that, if upon the trial of any person for *any such subsequent felony as aforesaid*, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony."

(*w*) *Att.-Gen. v. Bowman*, 2 B. & P. 532, n. *a.*, per Eyre, C. B. His Lordship observed, that "the true line of distinction is this; in a direct prosecution for a crime, such evidence is admissible; but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not."

(*x*) *Doe v. Hicks*, per Buller, J., cited by Gibbs, *arguendo*, in *Doe v. Walker*, 4 Esp. 50; B. N. P. 296, nom. *Goodright v. Hicks*, S. C.

(*y*) *Cornwall v. Richardson*, Ry. & M. 305, per Abbott, C. J.

(*z*) *Rodriguez v. Tadmire*, 2 Esp. 721.

(*a*) *Newsam v. Carr*, 2 Stark. R. 69, per Wood, B.; *Gregory v. Thomas*, 2 Bibb, 286. In America, this kind of evidence has been also rejected in actions of assault and battery, *Givens v. Bradley*, 3 Bibb, 192; and in *assumpsit*, *Naah v. Gilkeson*, 5 Serg. & Raw. 352; and is held to be inadmissible whenever the

been held that, in an action of trespass for false imprisonment on a criminal charge, the defendant could not cross-examine, either as to the plaintiff's bad character, or as to previous charges made against him (*b*).

§ 261. A distinction, however, has been taken between those cases where particular acts of misconduct are imputed to a party, and those where his *general conduct is put in issue*; and though evidence of character is rejected in the former, it has several times been admitted in the latter class (*c*). Thus, in an action for a libel, contained in an answer to inquiries respecting the character of a governess, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being ladylike or good-tempered," general evidence was given of her competency, good-temper, and manners, by witnesses who were her personal friends (*d*); and on the same principle, where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness, with whom she had formerly lived, was allowed to testify to her antecedent good conduct (*e*). These cases, however, can scarcely be deemed an exception to the rule of exclusion; for, it is clear that, as in cumulative offences, such as treason or barratry, or conspiracy to carry on the business of common cheats, many acts are given in evidence, because such crimes can be proved in no other way (*f*), so, where the general behaviour of a party is impeached, it is only by general evidence that the charge can be rebutted.

§ 262. It has been above observed, that in some cases general evidence of character is admissible, for the purpose of increasing or diminishing the amount of *damages* (*g*). Thus, evidence impeach-

general character is involved by the plea only, and not by the nature of the action, *Anderson v. Long*, 10 Serg. & Raw. 55; *Potter v. Webb*, 6 Greenl. 14; *Gregory v. Thomas*, 2 Bibb, 286.

(*b*) *Downing v. Butcher*, 2 M. & Rob. 374; *Jones v. Stephens*, 11 Price, 235.

(*c*) *Doe v. Hicks*, per Buller, J., as cited by Gibbs, *arguendo*, in 4 Esp. 50.

(*d*) *Fountain v. Boodle*, 3 Q. B. 5.

(*e*) *King v. Waring*, 5 Esp. 14, per Lord Alvanley.

(*f*) *R. v. Roberts*, 1 Camp. 399, per Lord Ellenborough. (*g*) Ante, § 258.

ing the previous general character of the wife or daughter in regard to chastity, is admissible under the general issue, in an action by the husband for adultery, or by the father for seduction (*h*); for in these actions, whether they be brought in trespass or case, the plaintiff in reality seeks compensation for the pain which the defendant has caused him to suffer, by disgracing his family, and ruining his domestic happiness; and it is manifest that, such being the true, though in cases of seduction not the ostensible, ground of action (*i*), the damages should be commensurate with the pain, which will vary according as the character of the wife or daughter has been previously unblemished or profligate. In these cases, therefore, not only evidence of general bad character is admissible in mitigation of damages, but the defendant may even prove particular acts of immorality or indecorum (*j*).

§ 263. But evidence of these acts, as well as proof of general bad character, must be confined to what occurred *previously* to the defendant's misconduct, because this very misconduct may, by weakening the principles of the woman, have indirectly caused any subsequent immorality, and may itself have directly occasioned her general want of reputation (*k*). Whether, in an action of seduction, where the plaintiff's daughter is called as a witness, the defendant can prove specific acts of immorality, without first laying a foundation for such evidence in the cross-examination of the woman, is not perfectly clear; though, on principle, there appears to be no objection to such a course, provided the evidence be tendered with the view, not of impeaching the veracity of the party seduced, but of showing that, as her previous conduct had been disgraceful, the father's feelings could not have been wounded by the misconduct of the defendant (*l*). However, if the daughter, in her examination in chief, state that the defendant has seduced her, and that she has borne a child in consequence, and the defence

(*h*) B. N. P. 27, 296; *Elsam v. Faucett*, 2 Esp. 563, per Lord Kenyon.

(*i*) See *Dodd v. Norris*, 3 Camp. 520, per Lord Ellenborough; *Andrews v. Askey*, 8 C. & P. 9, per Tindal, C. J. See also cases cited in n. *a.* to S. C.; and *Grinnell v. Wells*, 7 M. & Gr. 1033, 1043.

(*j*) *Verry v. Watkins*, 7 C. & P. 308, per Alderson, B.; B. N. P. 27, 296.

(*k*) *Elsam v. Faucett*, 2 Esp. 562; B. N. P. 27.

(*l*) *Carpenter v. Wall*, 11 A. & E. 803; 3 P. & D. 457, S. C.

be that she has declared another person to be the father, it is clear that witnesses cannot be called to prove her declarations, unless she be first cross-examined as to the fact of her having made them; because, though language of this kind, if lightly uttered, would tend to degrade her character, yet if used in earnest, it would directly contradict the testimony she had given, and would be evidence, not in mitigation of damages, but in bar of the action (*m*).

§ 264. In actions for criminal conversation, the defendant may also prove in mitigation of damages, that the plaintiff has been guilty of notorious infidelity; has turned his wife out of doors; has refused to maintain her; or has otherwise been guilty of dissolute conduct (*n*); for, in such cases, a man can scarcely complain of the loss of that society upon which he has himself placed so little value. It seems also that, upon a like principle, evidence may be given, in an action for seduction, that the plaintiff is a man of profligate habits. In actions for breach of promise of marriage a similar rule prevails, the defendant being entitled, under the general issue, to prove in mitigation of damages, that the plaintiff is a person, either of bad character (*o*), or of coarse and brutal manners (*p*), though, if the acts of misconduct relied upon were committed *after* the promise, or even *before* that event, *without the notice* of the defendant (*q*), and were sufficiently glaring to constitute a bar to the action (*r*), they can only be proved under a special plea (*s*).

§ 265. Whether, in an action for defamation, evidence impeaching the plaintiff's previous general character, and showing that, at the time of the publication, he laboured under a general suspicion of

(*m*) *Carpenter v. Wall*, 11 A. & E. 803; 3 P. & D. 467, S. C.; *Andrews v. Askey*, 8 C. & P. 9, per Tindal, C. J.

(*n*) B. N. P. 27; *Bromley v. Wallace*, 4 Esp. 237.

(*o*) *Foulkes v. Sellway*, 3 Esp. 236, per Lord Kenyon. See also *Johnston v. Caulkins*, 1 Johns. C. 116; *Boynton v. Kellogg*, 3 Mass. 189.

(*p*) *Leeds v. Cook*, 4 Esp. 258, per Lord Ellenborough.

(*q*) *Irving v. Greenwood*, 1 C. & P. 350, per Abbott, C. J.

(*r*) *Leeds v. Cook*, 4 Esp. 256; *Baddeley v. Mortlock*, Holt's N. P. R. 151.

(*s*) Reg. Gen. H. T. 1834, 5 B. & Ad. ix. See *Young v. Murphy*, 3 Bing. N. C. 54; and *Pujolas v. Holland*, Ir. Cir. R. 19.

having been guilty of the charge imputed to him by the defendant, is admissible as affecting the question of damages, is a point which has been much controverted. On the one hand it is urged, that the admission of such evidence would be cruelly unjust, as it would throw upon the plaintiff, while seeking redress in a court of justice for a specific injury, the difficulty of showing an uniform propriety of conduct during his whole life, and would give the defendant an opportunity, under pretence of mitigating the damages, of continuing and aggravating the original calumny; and that, too, under circumstances, when, from the absence of any plea of justification, his opponent was utterly unprepared to disprove the aspersions. It is further contended, that if such evidence were admissible, any man might fall a victim to a combination made to ruin his good name, even by means of the very action which he should bring, in order to free himself from the effects of malicious slander; that timid, though well-conducted men, would consequently not dare to vindicate their characters in courts of justice, and thus libellers would enjoy a most dangerous impunity. To this it is replied with much force, that, though the arguments on the other side would be entitled to great weight, if the question respected the right of proving *particular acts* of misconduct, they do not apply where evidence is offered of merely *general reputation*; that every man, who demands compensation for the ruin of his character, ought to be prepared to rebut any evidence of his general bad conduct; that the danger of admitting testimony of this kind is only imaginary, since the witnesses, on cross-examination, might be compelled to state the grounds of their belief; that, as any failure in the evidence would probably much increase the damages, witnesses would scarcely be called, except in support of a decisive case; that the law will not presume the existence of criminal conspiracies to ruin reputations, and cannot be moulded to suit the convenience of irrational timidity; that, to estimate the extent of the injury which a plaintiff has sustained, and, consequently, the amount of damages to which he is entitled, the jury must first ascertain what was the real value of his character at the time when it was attacked by the defendant; and, that they can best, if not only, arrive at a safe conclusion on this point, by inquiring what opinion was previously entertained respecting him,

by those with whom he was personally acquainted. Such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favour of the affirmative, even though the defendant has pleaded truth as a justification, and has failed in establishing his plea (*t*). But it seems that here, as in other cases where witnesses to character are admitted, evidence must be confined to the particular trait which is attacked in the alleged libel, and, as to this, it can only furnish proof of general *reputation*, and must by no means condescend to particular *acts* of bad *conduct* (*u*).

§ 266. In *aggravation of damages* the plaintiff cannot give evidence of *general good character*, unless counter-proof has been first offered by the defendant; for, until the contrary appear, the presumption of law is already in his favour. Therefore, in an action of slander for imputing theft, the plaintiff will not be allowed to prove his character for honesty, even though the defendant has placed on the record pleas of justification (*v*). This rule has, in some cases, been carried to a cruel extent. Thus, in an action of seduction, where evidence was produced for the defence, to prove that the girl had previously had a child by another man, Lord Ellenborough would not allow a question to be asked respecting her general good character for chastity, but restricted the plaintiff

(*t*) See *Richards v. Richards*, 2 M. & Rob. 557; — *v. Moor*, 1 M. & Sel. 284; *Earl of Leicester v. Walter*, 2 Camp. 251; *Williams v. Callender*, Holt's N. P. R. 307; *Eamer v. Merle*, per Lord Ellenborough, cited 2 Camp. 253; *Knobell v. Fuller*, Pea. Add. Ca. 139, per Eyre, C. J.; *Newsam v. Carr*, 2 Stark. R. 70, per Wood, B.; *Ellershaw v. Robinson*, per Holroyd, J.; *Moore v. Oastler*, in 1836, per Lord Denman, after consulting Parke, B.; *Mawby v. Barber*, in 1826, per Lord Tenterden; and *Hardy v. Alexander*, in 1837, per Coltman, J. These last four cases are cited in 2 St. Ev. 641, 642, n. (*e*). *Kirkman v. Oxley*, per Heath, J., cited 2 St. Ev. 306, n. (*k*). *Contrà*—*Jones v. Stevens*, 11 Price, 235; *Waithman v. Weaver*, D. & R. N. P. C. 10; 11 Price, 257, n. S. C.; *Cornwall v. Richardson*, Ry. & M. 305, per Abbott, C. J.; *Snowdon v. Smith*, per Chambre, J., cited 1 M. & Sel. 286. For the American authorities, see *Root v. King*, 7 Cowen, 613; *Bailey v. Hyde*, 3 Conn. 463; *Bennett v. Hyde*, 6 Conn. 24; *Douglass v. Tousey*, 2 Wend. 352; *Inman v. Foster*, 8 Wend. 602; *Walcott v. Hall*, 6 Mass. 514; *Ross v. Lapham*, 14 Mass. 275; *Foot v. Tracy*, 1 Johns. 45.

(*u*) See cases cited in last note, and further, *Andrews v. Vanduzer*, 11 Johns. 38; *Sawyer v. Eifert*, 2 Nott & Mc Cord, 511.

(*v*) *Cornwall v. Richardson*, Ry. & M. 305, per Abbott, C. J.

to the proof that the specific charge made by the defendant was false (*w*) ; and the same learned judge, on another occasion, where the daughter was cross-examined at length, with the view of showing that she had been guilty of gross levity and indelicacy, rejected similar evidence, observing that the witness, on her re-examination, had had ample opportunity of explaining her conduct (*x*). In another case for criminal conversation, in which the defendant had endeavoured, by cross-examining the plaintiff's witnesses, to impeach his character, but had failed in the attempt, Lord Kenyon refused to permit the plaintiff to call witnesses to his general good conduct (*y*). It is true that, in these cases, the facts insinuated had, or might have, been denied, and that, consequently, the characters attacked remained, in strictness, unimpeached ; still, the very circumstance of the questions being asked was calculated to excite a suspicion in the minds of the jury, which, in common justice, the plaintiff should have had an opportunity of entirely removing (*z*). It is satisfactory to find that a contrary rule has prevailed in two later cases (*a*), one of which has been recognised in Ireland (*b*).

§ 267. The law which regulates the admission of general evidence of character, for the purpose of *impeaching the veracity of a witness*, will be discussed hereafter (*c*) ; but it may be here convenient to point out how far such evidence will be receivable, where its object is, not so much to shake the credit of the witness, as to show directly that the act in question has not been committed. Thus, on indictments for rape, or an attempt to commit that crime, while evidence of general bad character is admissible to show that the prosecutrix, like any other witness, ought not to be believed upon her oath, proof that she is a reputed prostitute would go far towards raising an inference that she yielded willingly to the

(*w*) *Bamfield v. Massey*, 1 Camp. 460.

(*z*) *Dodd v. Norris*, 3 Camp. 519.

(*y*) *King v. Francis*, 3 Esp. 116.

(*z*) 1 C. & P. 100, n. (*a*) ; 2 St. Ev. 306, 307.

(*a*) *Bate v. Hill*, 1 C. & P. 100, per Park, J. ; *Murgatroyd v. Murgatroyd*, per Bayley, J., cited 2 St. Ev. 307, n. (*o*). See also *R. v. Clarke*, 2 Stark. R. 241.

(*b*) *Brown v. Goodwin*, Ir. Cir. Rep. 61, per Torrens, J. Trespass for seduction. The daughter was asked questions tending to impeach her reputation, whereupon the plaintiff was allowed to call witnesses to speak to her general good character.

(*c*) See Chapter "*On Examination of Witnesses*," ad. fin.

prisoner's embraces. General evidence, therefore, of this kind will be received, though the woman be not called as a witness, and though, if called, she be not asked, on cross-examination, any questions tending to impeach her character for chastity (*d*); but it seems that the counsel for the defence cannot go further, and prove specific immoral acts, unless he has first given the prosecutrix an opportunity of denying or explaining them; and even then, the evidence must be confined to her previous conduct with the prisoner, and cannot charge her with having had criminal connexion with other persons (*e*).

(*d*) *R. v. Clarke*, 2 Stark. R. 241, per Holroyd, J.; *R. v. Clure*, Ir. Cir. R. 275, per Crampton, J.

(*e*) *R. v. Martin*, 6 C. & P. 562; *R. v. Hodgson*, R. & R. 211; *R. v. Aspinall*, per Hullock, B., cited 3 St. Ev. 952, n. (*c*). On one occasion the prisoner's counsel was allowed to ask the prosecutrix, with the *view of contradicting her*, whether she had not, on a day since the alleged rape, been walking in a certain street with a common prostitute, looking out for men. *R. v. Barker*, 3 C. & P. 589, per Park, J., after consulting Parke, J.: see also *Verry v. Watkins*, 7 C. & P. 308, and *Andrews v. Askey*, 8 C. & P. 7.

CHAPTER III.

OF THE BURTHEN OF PROOF.

§ 268. A THIRD RULE, which governs the production of evidence, is, that *the burthen of proof lies on the party who substantially asserts the affirmative of the issue*. This rule of convenience, which in the Roman law is thus expressed, *Ei incumbit probatio, qui dicit, non qui negat* (a), has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable (b); and, moreover, it is but reasonable and just that the party who relies upon the existence of a fact, should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form; for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form, at his pleasure (c).

§ 269. The best *tests* that can be devised for ascertaining on whom the burthen of proof lies, are, first, to consider which party would succeed if no evidence were given on either side (d); and, secondly, to examine what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the onus must lie on whichever party would fail, if either of these steps were pursued (e). For instance, if, in an action of covenant or assumpsit, brought against a tenant, the breach assigned be that

(a) Dig. Lib. 22, tit. 3, 1, 2; Masc. de Prob. Concl. 70, tot.; Concl. 1128, n. 10, See Tait Ev. 1.

(b) Dranquet v. Prudhomme, 3 Louis. R. 83, 86.

(c) Soward v. Leggatt, 7 C. & P. 615, per Lord Abinger.

(d) Amos v. Hughes, 1 M. & Rob. 464, per Alderson, B.; Belcher v. M'Intosh, 8 C. & P. 721, per id.; Doe v. Rowlands, 9 C. & P. 735, per Coleridge, J.; Osborn v. Thompson, 2 M. & Rob. 256, per Erskine, J.; Ridgway v. Ewbank, 2 id. 218, per Alderson, B.; Geach v. Ingall, 14 M. & W. 97, per id.

(e) Mills v. Barber, 1 M. & W. 427, per Alderson, B.

the premises were *not* kept in repair, and this allegation be traversed by the plea, the plaintiff must prove his negative averment (*f*); for though, according to the grammatical construction of the issue, the affirmative lies on the defendant, yet the substantial merits of the case must be proved by the plaintiff; and if no evidence were given, or if the allegation on which issue was joined, were struck from the record, the defendant would clearly be entitled to a verdict. So, if a declaration on a life policy, after averring that the insurance was effected on a statement made by the plaintiff, that the insured was not subject to habits or attacks of illness tending to shorten life, but was in good health, should allege that this statement was true, and the defendant were to plead that it was false in these respects, that the insured was subject to habits and attacks tending to shorten life, to wit, to habits of intemperance and attacks of erysipelas, and was ill at the time when the statement was made, the burthen of proof would lie upon the plaintiff, though the plea should conclude with a verification, and be met by a replication *de injuriâ*, because, to entitle the plaintiff to a verdict, some evidence must be given to show that, at the time when the policy was effected, the life was insurable (*g*). Again, if to an action of *assumpsit* for not executing a contract in a workmanlike manner, the defendant plead that the work was properly done (*h*), or if a declaration allege that a horse sold under a warranty was unsound, and this fact be traversed by the plea (*i*), the onus, in either case, will lie on the plaintiff; and the same rule will prevail in an action brought against an attorney for not using due diligence (*j*), or against a merchant for not loading a

(*f*) *Soward v. Leggatt*, 7 C. & P. 613; *Doe v. Rowlands*, 9 C. & P. 734, per Coleridge, J.; *Belcher v. M'Intosh*, 8 C. & P. 790, per Alderson, B.

(*g*) *Huckman v. Firnie*, 3 M. & W. 505, 510; *Ashby v. Bates*, 15 M. & W. 589; 4 Dowl. & L. 33, S. C.; *Geach v. Ingall*, 14 M. & W. 95; *Rawlins v. Desborough*, 2 M. & Rob. 70, per Lord Denman; 8 C. & P. 321, S. C.; *Craig v. Fenn*, C. & Marsh. 43, per *id.* In *Pole v. Rogers*, 2 M. & Rob. 287, Tindal, C. J., held that, under similar pleadings, the defendant should begin; but this case, being distinctly opposed to the authorities stated above, cannot be supported.

(*h*) *Amos v. Hughes*, 1 M. & Rob. 464.

(*i*) *Osborn v. Thompson*, 9 C. & P. 337, per Erskine, J.; 2 M. & Rob. 254, S. C.; *Cox v. Walker*, cited 9 C. & P. 339, per Lord Denman; S. P. ruled per Tindal, C. J., as cited *id.* 338. In *Fisher v. Joyce*, cited *id.* 338, Coleridge, J., allowed the defendant to begin, but in *Doe v. Rowlands*, *id.* 735, he confessed that this decision was wrong.

(*j*) *Shilcock v. Passman*, 7 C. & P. 291, per Alderson, B.

sufficient cargo on board a ship, pursuant to a charter-party (*k*), or against an architect for not building houses according to a specification (*l*), and, indeed, in every case in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in support of his claim (*m*).

§ 270. To this general rule, that the burthen of proof lies on the party holding the substantial affirmative, there are some *exceptions*, which it will be proper to notice. First, if there be a *disputable presumption of law* (*n*) in favour of an affirmative allegation, the party who supports the negative must call witnesses to rebut this presumption. For instance, where a shipper was charged, in an action on the case, with having shipped goods dangerously combustible on board the plaintiff's ship, without giving notice of their nature to any officer on board, whereby the ship was burned and lost, it was held that, inasmuch as the omission to give notice would have been a criminal neglect of duty on the part of the defendants, the law presumed that notice had been given, and threw upon the plaintiff the burthen of proving the negative (*o*). So, where a landlord brought an action of ejectment against his tenant, on an alleged forfeiture by breach of a covenant to insure in some office in or near London, it was held that the omission to insure must be proved by the plaintiff, because the law, in favour of the party in possession, will presume that he has satisfied the terms of the covenant, and had the landlord wished to have been relieved from the necessity of establishing this negative proof, he might easily have inserted a clause to that effect in the lease (*p*). If, to an action on a policy of insurance effected on a ship, the

(*k*) *Ridgway v. Ewbank*, 2 M. & Rob. 217, per Alderson, B.

(*l*) *Smith v. Davies*, 7 C. & P. 307, per Alderson, B.

(*m*) *Doe v. Johnson*, 7 M. & Gr. 1047, 1060, per Tindal, C. J.

(*n*) It is only with reference to disputable presumptions of law that this rule applies, for if the presumption be conclusive, no evidence can be given to rebut it; if it be merely one of fact, it can only be made through the intervention of a jury. See ante, §§ 58, 90, 132, 141. (*o*) *Williams v. East India Co.*, 3 East, 192.

(*p*) *Doe v. Whitehead*, 8 A. & E. 571. The Court there held that the defendant's refusal to produce the policy or any receipt for premium, both before the action was commenced, and also at the trial, was not sufficient proof of an omission to insure, though due notice to produce had been served.

underwriter plead that certain material facts, known to the assured, had been concealed from him, the burthen of proving the non-communication of these facts, will, on a replication *de injuriâ*, fall on the defendant; for, although the allegation contained in his plea may be negative in its terms, still, as it was the duty of the assured to make the communication, either upon the principle that every policy is based on the supposed existence of a certain state of facts, or on the ground that insurance is a contract *uberri-mæ fidei*, some evidence should be given by the underwriter to rebut the presumption that the assured had discharged his duty. The amount of the proof required will, indeed, vary according to the circumstances of the case, and very slender evidence will often be sufficient; for, suppose a ship was known by the assured to have been burnt at the time when the insurance was effected, proof of this fact would in itself be reasonable evidence to show that it had not been communicated, because no underwriter in his senses, had he been aware of such a circumstance, would have executed the policy (*q*).

§ 271. Again, if to an action brought by an indorsee against the acceptor of a bill of exchange, the defendant plead that the bill was accepted by him for the accommodation of the drawer, and was endorsed to the plaintiff without value, and the plaintiff reply that it was endorsed to him for a valuable consideration, it is clear that the burthen of proving this issue will lie on the defendant, because the mere possession of the bill raises a *primâ facie* presumption of due consideration having been given for it (*r*), and perhaps also, independent of this presumption, because the defendant must, as we have just seen, prove all those facts, whether affirmative or negative, which are necessary to establish his defence to the action (*s*). So, if the defendant were to plead that he had accepted the bill for his own accommodation, and that the drawer, instead of getting it discounted for the use of the defendant, endorsed it to a stranger, who fraudulently endorsed it to the plaintiff, after it became due, or without consideration, and the plaintiff were to traverse this last

(*q*) *Elkin v. Janson*, 13 M. & W. 655, 663, 665, per Parke and Alderson, Bs.

(*r*) *Mills v. Barber*, 1 M. & W. 425; Tyr. & Gr. 835; 5 Dowl. 77, S. C.; *Whittaker v. Edmunds*, 1 M. & Rob. 366, per Patteson, J.

(*s*) See per Alderson, B., in *Elkin v. Janson*, 13 M. & W. 664.

allegation, the burthen of proving that the bill was overdue at the time of endorsement, or that no value was given for it by the holder, would devolve on the defendant, because the plea does not contain such an allegation of fraud, as would counteract the presumption arising from the possession of the instrument (*t*). If, however, the defendant's plea, after disclosing some original fraud or illegality in the transaction, as, for instance, after stating that the bill had been obtained by fraud or duress, or had been given for gambling purposes, or had been lost or stolen, were to aver that the plaintiff held it without value, and this last fact were to be traversed by the replication, it seems that the plaintiff in such case must prove his traverse, because the presumption of illegality arising from an admitted fraud, will attach to every subsequent holder, and render him incapable of recovering in the absence of evidence, showing under what circumstances he became possessed of the bill (*u*). So, where in answer to an action on a promissory note brought by the indorsee against the maker, the defendant pleaded that he had presented a petition to the Court of Bankruptcy, and that the note, which had been endorsed to the plaintiff without value, had been given to the indorser in consideration of his not opposing the petition, the Court held, on a replication *de injuriâ*, that, the illegality having been proved, the onus was cast upon the plaintiff of showing that he gave value (*v*).

(*t*) *Lewis v. Parker*, 4 A. & E. 838; *Jacob v. Hungate*, 1 M. & Rob. 445, per Parke, B.; *Brown v. Philpot*, 2 id. 285, per Lord Denman. In this last case the replication was *de injuriâ*. See also *Smith v. Martin*, C. & Marsh. 58.

(*u*) See cases cited in preceding notes (*t*) and (*r*). Also *Bingham v. Stanley*, 2 Q. B. 117; 1 G. & D. 237. S. C., overruling Lord Denman's decision at *Nisi Prius* as reported in 9 C. & P. 374. In *Elkin v. Janson*, 13 M. & W. 664, 665, Alderson, B., observes, "But take the case of fraud;—where the defendant, who is sued upon a bill of exchange, pleads that it was obtained from the drawer by fraud on the part of A., and that A. then indorsed it to the holder; there proof of the fraud renders it highly probable that A., who has obtained the bill from the drawer by fraud, and has not been able to get anything from him, would hand it over to some one else, to be the conduit-pipe for obtaining value for it. That raises a presumption, until some answer is given, that there has been no indorsement for value, and casts upon the plaintiff, after this general evidence, the necessity of negating that presumption, and of showing that, although the above inference might fairly be made from the fact of there being fraud in the original inception of the bill, value has in fact been given for it by the indorsee."

(*v*) *Bailey v. Bidwell*, 13 M. & W. 73, overruling *Paterson v. Hardacre*, 4 Taunt. 114.

§ 272. Again, if the plaintiff were to aver that a certain party was, at a specified time, of sound mind, and this averment were traversed by the defendant, the latter would be bound to prove the negative allegation of incompetency, because the law presumes that every man is sane till the contrary is shown, and consequently this presumption would equally serve the plaintiff's purpose, as though he had given express evidence of the fact. If, however, such an issue were to come from the Court of Chancery, the plaintiff would be called upon to prove the sanity of the party, because the Court, in such case, would presume, that the judge directing the issue had considered that a *prima facie* case of madness had been made out, and, by ordering the party, who relied upon the sanity, to be the plaintiff, had intended that the burthen of proof should devolve upon him (*w*). Again, if to an action of debt or assumpsit, there be a plea of infancy, and the replication relies on a written and signed ratification of the contract after the defendant became of age, no evidence need be given by the plaintiff to show that the defendant was of age when he signed the paper, but the burthen of disproving that fact will lie on the defendant (*x*). This rule rests partly on the presumption that a person will not contract till he is of age to do so in a binding manner; partly, on the ground that the replication, in substance, contains a negative assertion that the defendant was not a minor; and partly, on a rule that will be presently mentioned (*y*), which throws the onus of proof on whichever party has peculiar means of knowledge respecting the fact in dispute.

§ 273. On the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burthen of proof will, unless shifted by legislative interference, fall, in criminal proceedings, on the prosecuting party, though, in order to convict, he must necessarily have recourse to negative evidence. Thus, if a statute, in

(*w*) *Frank v. Frank*, 2 M. & Rob. 314. See also *Turberville v. Patrick*, 4 C. & P. 557.

(*x*) *Borthwick v. Carruthers*, 1 T. R. 648; *Hartley v. Wharton*, 11 A. & E. 934; 3 P. & D. 529, S. C.

(*y*) *Post*, § 276.

the direct description of an offence, and not by way of proviso (z), contain negative matter, the indictment or information must also contain a negative allegation, which must, in general, be supported by *prima facie* evidence. Such was formerly the case, in prosecuting parties for coursing deer in inclosed grounds, without the consent of the owner (a); or for cutting trees without such consent (b); and although the old statutes, which made the absence of consent a material element in these offences, are now repealed, the cases decided upon them will illustrate the principle under discussion. In such cases, indeed, it is not necessary to call the owner himself to prove that no consent was given by him, but the jury may infer the absence of consent from the conduct of the party accused, or from other circumstances of the case; still, some evidence must be given,—as, for instance, that the act complained of was done in a suspicious manner, or at an unseasonable hour, or that the defendant, when detected, endeavoured to escape, or the like,—which, in the absence of counter testimony, would afford ground for presuming that the allegation of non-consent was true (c).

§ 274. The necessity of giving this *prima facie* evidence on the part of the prosecution having been found, in the great majority of criminal cases, not only useless, but highly inconvenient, the legislature has, in many instances, interfered, sometimes by re-describing the offences, and omitting all mention of the negative matter (d), but generally, by expressly enacting, that the *burthen of proving authority, consent, lawful excuse* and the like, should lie on the *defendant*. Thus, if a party be indicted for making,

(z) *R. v. Jarvis*, 1 East, 644, n.

(a) *R. v. Allen*, 1 Moo. C. C. 154; 42 Geo. 3, c. 107, § 1, repealed by 7 & 8 Geo. 4, c. 27, and other provisions, omitting all mention of consent, substituted by 7 & 8 Geo. 4, c. 29, § 26.

(b) *R. v. Hazy*, 2 C. & P. 458; 6 Geo. 3, c. 36, repealed by 7 & 8 Geo. 4, c. 27, and other provisions, omitting all mention of consent, substituted by 7 & 8 Geo. 4, c. 30, §§ 19, 20.

(c) See *R. v. Allen*, 1 Moo. C. C. 154, overruling *R. v. Rogers*, 2 Camp. 654, where it was held that the owner must be called; *R. v. Hazy*, 2 C. & P. 458; *R. v. Stone*, 1 East, 639; *R. v. Hawkins*, 10 East, 211; *Frontine v. Frost*, 3 B. & P. 302; *Evans v. Birch*, 3 Camp. 10.

(d) See the preceding notes (a) and (b).

mending, or having in his possession coining tools, or for conveying such tools, or any coin or bullion out of the mint (*e*); or for having in his possession instruments or materials for making, either false stamps, in England (*f*) or Ireland (*g*), or letter stamps (*h*), or excise paper (*i*), or paper used for making exchequer bills (*j*), bank notes (*k*), the notes of private bankers (*l*), or foreign notes (*m*); or for manufacturing paper similar to that used for postage covers (*n*), or exchequer bills (*o*); or for having in possession such paper before it has been stamped and issued for use (*p*); or for engraving bank notes or any part thereof (*q*), the notes of private bankers (*r*), or foreign notes (*s*); or for having in possession counterfeit dies for making gold and silver wares, or instruments for making such dies, or any wares of gold, silver, or base metal, having thereon forged dies (*t*), or for having in possession hackney-coach and stage plates, or drivers or watermen's tickets (*u*);—in all these, and in several other cognate offences, the defendant, by the express language of the statutes relating to them, is bound to protect himself, by showing the existence of some lawful authority or excuse.

§ 275. So, if a party be charged with having warlike, naval, ordnance, or other public stores in his possession, or with concealing, or selling such stores, he must, in order to secure an acquittal, produce a certificate from the proper officer authorising him to act as he has done (*v*). So, if a person be indicted for making a signal to a smuggling vessel at sea, the burden of proving that the signal was not made for the purpose of giving illegal notice will lie upon the defendant (*w*); and if spirits or

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| (<i>e</i>) 2 Will. 4, c. 34, §§ 10, 11, 12. | (<i>f</i>) 3 & 4 Will. 4, c. 97, § 12. |
| (<i>g</i>) 56 Geo. 3, c. 56, § 52. | (<i>h</i>) 3 & 4 Vict. c. 96, § 22. |
| (<i>i</i>) 2 Will. 4, c. 16, § 3. | |
| (<i>j</i>) 5 & 6 Vict. c. 66, § 9. | |
| (<i>k</i>) 11 Geo. 4 & 1 Will. 4, c. 66, § 13. | (<i>l</i>) Id. § 17. (<i>m</i>) Id. § 19. |
| (<i>n</i>) 3 & 4 Vict. c. 96, § 29. | (<i>o</i>) 5 & 6 Vict. c. 66, § 9. |
| (<i>p</i>) 3 & 4 Vict. c. 96, § 30; 5 & 6 Vict. c. 66, § 10. | |
| (<i>q</i>) 11 Geo. 4 & 1 Will. 4, c. 66, §§ 15, 16. | (<i>r</i>) Id. § 18. (<i>s</i>) Id. § 19. |
| (<i>t</i>) 7 & 8 Vict. c. 22, §§ 2, 3. | |
| (<i>u</i>) 1 & 2 Will. 4, c. 22, § 25; 2 & 3 Will. 4, c. 120, § 32; 6 & 7 Vict. c. 86, § 20. | |
| (<i>v</i>) 9 & 10 Will. 3, c. 41, § 2; 9 Geo. 1, c. 8, § 3; 54 Geo. 3, c. 60; 55 Geo. 3, c. 127, § 2; 39 & 40 Geo. 3, c. 89, § 1. | (<i>w</i>) 8 & 9 Vict. c. 87, § 61. |

tobacco are found being removed without a permit, they will be deemed to be run goods, unless the owner can prove the contrary (*x*). So, in the hosiery and silk weaving trades, if any dispute arises between the manufacturer and the workman respecting the alleged imperfect execution of any work, which has been delivered to the manufacturer or his agent, the work, if not produced in order to adjudication, will be deemed to have been properly executed (*y*). So, if complaint be made that a person, employed in a factory or print work without a surgical certificate, is under the age of sixteen, the employer shall be liable to penalties, unless he can prove, by an extract from a legal register of birth or baptism, that the party employed has completed his sixteenth year (*z*).

§ 276. In several of the instances above given, the legislature has adopted a principle which the common law also recognises, and which may here be noticed as a *second exception* to the general rule, that the burthen of proof lies on the party who substantially alleges the affirmative. The exception is this, that, where the subject-matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour (*a*). Thus, if an action for penalties be brought against a person for practising as an apothecary without a certificate (*b*), it is evident that the plaintiff would, independent of this exception, be bound to prove the want of a

(*x*) 8 & 9 Vict. c. 87, § 30. See also § 31.

(*y*) 8 & 9 Vict. c. 77, § 3; 8 & 9 Vict. c. 128, § 3.

(*z*) 7 & 8 Vict. c. 15, §§ 54, 55; 8 & 9 Vict. c. 29, § 18. For other illustrations, see ante, §§ 59, 64, 94.

(*a*) *Dickson v. Evans*, 6 T.R. 60, per Ashhurst, J. In *R. v. Turner*, 5 M. & Sel. 206, Bayley, J., says, "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative:" but in *Elkin v. Janson*, 13 M. & W. 662, Mr. Baron Alderson, while commenting on that passage, observed, "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the *weight* of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side."

(*b*) Under 55 Geo. 3, c. 194.

certificate; for first, though the allegation be in a negative form, its proof is essential to the plaintiff's case; and secondly, there is a general presumption of law that the defendant would not transgress the provisions of a statute; still, as the defendant is peculiarly cognisant of the fact, whether or not he has obtained a certificate, and, if he has obtained one, can have no difficulty in producing it, the law, which is founded on general convenience, will compel him to do so (c). This exception equally prevails in all civil or criminal proceedings instituted against parties for doing acts, which they are not permitted to do unless duly qualified; as for selling liquors, sporting (d), exercising a trade or profession, and the like (e). So, in misprision of treason, if the treason be proved, and the knowledge of it be traced to the prisoner, he is, in strictness, bound to negative the averment of concealment, by offering proof of a discovery on his part (f).

§ 277. The rules of law relating to the burthen of proof are obviously of great importance in all legal proceedings, especially when viewed in connection with the doctrine of presumptions; but questions respecting their application most frequently arise at *Nisi Prius*, on arguments respecting the *right to begin*. The privilege of opening the case to the jury is frequently one of considerable advantage, as it not only enables the party enjoying it to create an impression in his favour, which it is difficult by subsequent evidence to erase, but, in the event of witnesses being called by his opponent, it secures to him also the last word; still, there are cases, where a defendant goes to trial relying simply

(c) *Apoth. Co. v. Bentley*, Ry. & M. 159, per Abbott, C. J.

(d) The act of 1 & 2 Will. 4, c. 32, which relates to Game, enacts in § 42 that "it shall not be necessary in any proceeding against any person under that act, to negative by evidence any certificate, license, consent, authority, or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, license, consent, authority, or other matter of exception or defence, shall be bound to prove the same."

(e) *R. v. Turner*, 5 M. & Sel. 206; *Smith v. Jeffries*, 9 Price, 257; *Harrison's case*, Paley Conv. 45 n; *Sheldon v. Clark*, 1 Johns. 513; *U. S. v. Hayward*, 2 Gall. 485; *Gening v. The State*, 1 McCord, 573. See *Doe v. Whitehead*, 8 A. & E. 571; cited ante, § 270, where this rule was held inapplicable.

(f) *R. v. Thistlewood*, 33 How. St. Tr. 691, per Abbott, C. J., in charge to Grand Jury.

on the weakness of the plaintiff's case, and where, if called upon to begin, he will instantly be defeated (*g*). Hence it follows, that the duty of beginning is seldom a matter of indifference, but is generally regarded as an object which it is important either to attain or to avoid, according to the circumstances. The question, therefore, is frequently discussed with much spirit; and as the principles which govern the right are difficult of application, and, moreover, are not very distinctly understood, the decisions are alike numerous and conflicting. A lengthened examination of these decisions would be misplaced in a work of this nature, but perhaps a few general rules may be laid down, that will be found of practical value.

§ 278. The first general rule on the subject is, that *the party on whom the onus probandi lies (h), as developed on the record, must begin*. It has been sometimes asserted, that the right of beginning belongs to the party on whom the affirmative of the issue lies; but this assertion, if literally understood, is by no means accurate, since, as we have seen, it does not apply to cases, where either the affirmative allegation is supported by a legal presumption, or the truth of the negative averment is peculiarly within the knowledge of the party who relies on it (*i*). Indeed, the rule, as we have stated it, is subject to some *exceptions*, which it will be convenient here to notice. And, first, if the defendant will admit at the trial the whole *prima facie* case of the plaintiff, he will be entitled to begin, provided he could not, by his pleading, have made this admission at an earlier period. For instance, if a party, claiming premises as heir at law of the person last in possession, brings an action of ejectment against a devisee under such person's will, the defendant will be entitled to begin, on admitting, not only that the lessor of the plaintiff is heir, but that the ancestor through

(*g*) Best "*On Right to Begin*," 27, 28; *Edwards v. Jones*, 7 C. & P. 633. This was an action by indorsee against maker of a note; plea in substance amounted to want of consideration; replication, as to part of sum claimed, that plaintiff gave consideration for note, and as to residue, *nolle prosequi*. Held by Alderson, B., that on this issue defendant must begin, and he having no witness, plaintiff had a verdict.

(*h*) As to the best tests of the *onus probandi*, see ante, § 269.

(*i*) Best "*On Right to Begin*," 29. See §§ 270, 276, ante.

whom he claims, died seised of the estate (*j*). So, if the defendant, admitting at the trial a will under which the lessor of the plaintiff claims, relies on a subsequent devise or codicil, he will be allowed to begin (*k*); but if the defendant's title rests upon a conveyance from the ancestor (*l*), or if he claims, even in part, under the ancestor's marriage settlement (*m*), he cannot, by simply admitting the heirship of his opponent, and his own possession, deprive the former of his right to begin, because such an admission will not cover the entire title of the lessor of the plaintiff. So, where each party claimed as heir at law, and the defendant was clearly the heir, if legitimate, his admission of the plaintiff's conditional title was held insufficient to give him the initiative, because the plaintiff, in order to recover, must prove his own title; and although, in this particular case, the title might depend on the defendant's legitimacy, the fact of legitimacy did not constitute the direct issue (*n*). It seems indeed, that, to entitle the defendant to begin, he must make such an admission, as, if set out on the record, would, together with the facts which he is about to prove, amount to a plea in confession and avoidance (*o*).

§ 279. It should be observed, that in the instances just given, the defendant could not, by his form of pleading, have made this admission at an earlier period; and it is in consequence of this circumstance, that the exception in his favour has been allowed to prevail. If, therefore, in an action of trespass, the defendant

(*j*) *Doe v. Barnes*, 1 M. & Rob. 386, per Lord Denman; *Doe v. Smart*, id. 476, per Gurney, B., after consulting Patteson, J. In this last case the defendant was allowed to begin, though the plaintiff, as to part of the premises, was prepared to prove that he was assignee of an outstanding term.

(*k*) Per Lord Denman in *Doe v. Barnes*, 1 M. & Rob. 388; *Doe v. Corbett*, 3 Camp. 368, per Bayley, J.

(*l*) *Doe v. Tucker*, M. & M. 536, per Bolland, B.

(*m*) *Doe v. Lewis*, 1 C. & Kir. 122, per Maule, J.

(*n*) *Doe v. Bray*, M. & M. 166, per Vaughan, B.

(*o*) Assumpsit for goods sold and delivered; plea in abatement, non-joinder of another defendant; issue thereon. Held, if the defendant would admit the amount of the sum claimed, he should begin; *Bonfield v. Smith*, 2 M. & Rob. 519. The dictum of Alderson, B., in this case, that the defendant might begin without making such admission, would seem not to be law. It is directly opposed to the ruling of Lord Denman in *Morris v. Lotan*, 1 M. & Rob. 233, and seems overruled by the case of *Mercer v. Whall*, cited in next §.

chooses to plead not guilty, or if to an action on a bill of exchange, he traverses the acceptance or indorsement, he cannot, at the trial, by offering to admit the plaintiff's right to a verdict on these issues, claim the privilege of beginning, whatever special pleas may be placed on the record; but if he wishes to begin, he must first, by a judge's order, withdraw the pleas which he seeks to abandon (*p*). In one case, which was an action for goods sold and delivered, where a rule of court had been obtained by consent, ordering the defendant to admit the plaintiff's case, it has been held that the plaintiff was still entitled to begin and state the facts (*q*); and the same course has been pursued, where a Court of equity directed an action of trover to be brought, and ordered the defendant to admit the finding and conversion of the goods (*r*).

§ 280. Another *exception* to the rule under discussion rests upon the broad principles of public convenience and justice, and provides that the plaintiff shall begin in all actions where he seeks *substantial and unliquidated damages, though the general issue be not pleaded, and the affirmative lie upon the defendant*. This doctrine was promulgated by the judges many years back, as applicable to actions for *libel, slander, and injuries to the person* (*s*); and the Court of Queen's Bench has recently extended its operation to actions of covenant and assumpsit, and indeed, as it would seem, to *all actions*, where the plaintiff is seeking to recover actual damages of an *unascertained* amount. The case which establishes this important exception is that of *Mercer v. Whall* (*t*), and the language of Lord Denman, in pronouncing the judgment of the Court, well illustrates the subject. After observing that "the natural course would seem to be, that the plaintiff should bring

(*p*) *Pontifex v. Jolly*, 9 C. & P. 202, per Alderson, B.; *Price v. Seaward*, C. & Marsh. 23, per Wightman, J. See also *Rawlins v. Desborough*, 2 M. & Rob. 330.

(*q*) *Thwaites v. Sainsbury*, 5 C. & P. 69, per Tindal, C. J.

(*r*) *Turberville v. Patrick*, 4 C. & P. 557, per Bosanquet, J.

(*s*) *Carter v. Jones*, 6 C. & P. 64; 1 M. & Rob. 281, S. C.; *Mercer v. Whall*, 5 Q. B. 462, per Lord Denman.

(*t*) 5 Q. B. 447. That was an action of covenant by an attorney's clerk for improperly dismissing him, to which the defendant had pleaded, that the plaintiff had been guilty of misconduct in the service. The Court held that the plaintiff was entitled to begin.

his own cause of complaint before the Court and jury, in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damage to which he conceives the proof of such facts may entitle him" (*u*), his Lordship proceeds thus :—" In ejectment, the defendant may entitle himself to begin, by admitting that the plaintiff must recover possession unless the defendant can establish a certain fact in answer; and if in an action for damages the damages are ascertained, and the plaintiff has a *prima facie* case on which he must recover that known amount and no more, unless the defendant proves what he has affirmed in pleading, here is a satisfactory ground for the defendant's proceeding at once to establish that fact. But if the extent of damage is not ascertained, the plaintiff is the person to ascertain it; and his doing so will have the good effect of making even the defence, in a vast majority of cases, much more easily understood for all who are intrusted with the decision" (*v*).

§ 281. It remains only to be noticed, that this exception does not apply to cases where the damages, though real, are liquidated (*w*); or where, though unliquidated, they are obviously nominal (*x*); or where the plaintiff will not say whether or not he intends to proceed for substantial damages (*y*). Neither does it extend to actions of debt, in which the plaintiff need not give evidence as to the amount of his claim; and, therefore, where to an action of debt against a woman she pleaded coverture as her only plea, her counsel was held entitled to begin (*z*).

§ 282. A second general rule respecting the right to begin is, that *if the record contains several issues, and the burthen of proving any one of them lies on the plaintiff, he is entitled to begin, provided he will undertake to give evidence upon it* (*a*). This rule will equally

(*u*) P. 458.

(*v*) P. 464, 465.

(*w*) *Fowler v. Coster*, M. & M. 241, per Lord Tenterden; 3 C. & P. 463, S. C.; *Bonfield v. Smith*, 2 M. & Rob. 519.

(*x*) *Hodges v. Holder*, 3 Camp. 366, per Bayley, J.; *Jackson v. Heaketh*, 2 Stark. R. 518, per id. (*y*) *Chapman v. Rawson*, 15 Law J., N. S., Q. B. 225.

(*z*) *Woodgate v. Potts*, 2 C. & Kir. 457, per Parke, B.

(*a*) *Rawlins v. Desborough*, 2 M. & Rob. 328, per Lord Denman.

prevail, though it clearly appears, as matter of calculation, that, if the defendant should eventually succeed on one of the issues which he is bound to prove, the plaintiff could recover nothing on the issue which lies upon him (*b*). But the proviso at the end of the rule constitutes a material part of it; and, therefore, if to some special count, claiming liquidated damages, the plaintiff adds the common money counts, and the defendant, confessing and avoiding the former, pleads the general issue to the latter, this will not entitle the plaintiff to begin, unless in fact he intends to rely on the common money counts, and to adduce evidence in support of them, for the only object of an opening is to explain to the jury the facts which are to be proved by the witnesses (*c*).

§ 283. If several issues be joined, some of which lie on either party, the plaintiff may, at his option, go into the whole case in the first instance, or he may content himself with adducing evidence in support of those issues which he is bound to prove, reserving the right of rebutting his adversary's proofs, in the event of the defendant establishing a *prima facie* case with respect to the issues which lie upon him (*d*). The latter course is the one which, in practice, is most usually adopted, and the defendant may then have a special reply on the plaintiff's fresh evidence, while the plaintiff will be entitled to the general reply on the whole case. If, however, the plaintiff at the outset thinks fit to call any evidence to repel the defendant's case, he will not be permitted to give further evidence in reply; for if such a privilege were allowed to the plaintiff, the defendant, in common justice, might claim the same, and the proceedings would run the risk of being extended to a very inconvenient length (*e*). In one case where the general

(*b*) *Cripps v. Wells*, C. & Marsh. 489, per Rolfe, B.; recognised in *Booth v. Millns*, 15 M. & W. 669; 4 Dowl. & L. 52, S. C.

(*c*) *Smart v. Rayner*, 6 C. & P. 721, per Parke, B.; *Mills v. Oddy*, id. 728, per id., overruling *Homan v. Thompson*, id. 717; *Faith v. M'Intyre*, 7 C. & P. 44, per id.

(*d*) Formerly, when, either by pleading or notice, the defence was known, the plaintiff was bound to open his whole case, *Rees v. Smith*, 2 Stark. R. 30; but this practice, having been found inconvenient, has been abandoned. *Browne v. Murray*, Ry. & M. 254, per Abbott, C. J.

(*e*) *Browne v. Murray*, Ry. & M. 254, per Abbott, C. J.; *Sylvester v. Hall*, id. 255, n. per id.

issue and a set-off were pleaded to an action of *assumpsit*, the plaintiff was permitted to prove certain debts due to him from the defendant, and to reserve the proof of the remainder of his claim till evidence in support of the set-off had been given by the defendant (*f*); but, although the Court refused a new trial in this case, it may well be doubted whether such a course would now be allowed, without the mutual consent of both parties.

§ 284. In deciding upon the admissibility of evidence called in reply, regard must be had to the circumstances of the individual case, and considerable latitude will necessarily be granted to the judge in the exercise of his discretion. Thus, where a plaintiff in ejectment made out a *prima facie* case as heir-at-law, which was met by a will being proved for the defendant, he was permitted, in reply, to put in a subsequent will whereby the estates claimed were devised to himself; for although this will proved him to be entitled to the premises as devisee, and thus set up a title different from that on which he originally relied, it operated also as a revocation of the former will, and thus demolished the defendant's case (*g*). So, in an action on the case for negligent driving, where the plaintiff, as confirmatory evidence of the defendant's having committed the injury, had offered proof that, about the time in question, the defendant was at Layton where the collision took place, and the defendant had called witnesses to show that he was then at Richmond, Lord Denman refused to exclude further witnesses, who were tendered by the plaintiff to prove that the defendant was not at Richmond, but at Layton, when the accident occurred (*h*). This case certainly carries the privilege of adducing evidence in reply to its extreme limit, for although the plaintiff was at liberty to disprove the alibi by showing that the defendant was not at Richmond, yet when the witnesses went on to prove that he was at Layton, they not only gave evidence which ought to have been submitted to the jury in the first instance, but confirmed that which was actually given in chief, and which consequently should have then been exhausted (*i*). Where the issue

(*f*) *Williams v. Davies*, 1 Cr. & M. 464.

(*g*) *Doe v. Gosley*, 2 M. & Rob. 243, per Lord Denman.

(*h*) *Briggs v. Aynsworth*, 2 M. & Rob. 168. (*i*) See note (*a*) to S.C., p. 169, 170.

turned on the soundness of a horse which was exhibited to the jury during the defendant's case, the plaintiff was not allowed to recall his veterinary witnesses, who had attended the view, to give their then opinion respecting his soundness, these gentlemen having had an opportunity of inspecting the horse before the plaintiff's case had closed (*j*).

§ 285. It has been said that the question respecting the right to begin is a matter of practice and regulation upon which the presiding judge must exercise his discretion, and that the Court in banc will not interfere with his decision (*k*); but this has since been ruled to be an erroneous statement; and although the Courts at Westminster will certainly be unwilling to grant a new trial in a doubtful case, yet, if they see that the decision of the judge on this point was *manifestly wrong*, they will feel no scruple in interfering, at least if the complainant can show that he has in reality been *prejudiced* by the course pursued (*l*). It seems that the Court will not grant a new trial, merely because the judge has either admitted evidence in reply, which should in strictness have been produced in support of the plaintiff's original case (*m*), or has prevented the plaintiff from calling witnesses in anticipation of the defendant's case, provided such witnesses be subsequently examined in reply (*n*).

§ 286. The right to begin draws after it, both in civil and criminal proceedings, the right to *reply*, whenever the adversary adduces evidence to the jury in support of his case (*o*); but the mere commenting on a cash-book which has been used to refresh the memory of one of the adverse witnesses, or even a reference to parts of this book, not looked at by such witness, will not entitle the

(*j*) *Osborn v. Thompson*, 2 M. & Rob. 254, per Erskine, J.

(*k*) *Burrell v. Nicholson*, 1 M. & Rob. 306, per Lord Denman; *Bird v. Higginson*, 2 A. & E. 160.

(*l*) *Huckman v. Fernie*, 3 M. & W. 510, 511, 517; *Booth v. Millns*, 15 M. & W. 671, n.; 4 Dowl. & L. 52, 54, n., S. C.; *Chapman v. Emden*, 9 C. & P. 717, per Coleridge, J.; *Doe v. Rowlands*, id. 736, per id.; *Mercer v. Whall*, 5 Q. B. 447; *Geach v. Ingall*, 14 M. & W. 98, 99, per Pollock, C. B.

(*m*) *Williams v. Davies*, 1 Cr. & M. 465.

(*n*) *Smith v. Marrable*, C. & Marsh. 479.

(*o*) Best "*On Right to Begin*," 85, and cases there collected.

opposite counsel to reply (*p*); neither will the production of a paper which the judge has called for in order to satisfy his conscience (*q*). If in the course of the trial it shall become necessary for the defendant to call witnesses, for the purpose of informing the judge upon a question respecting the admissibility of evidence, the plaintiff's counsel will not thereby be entitled to the last word, because the evidence, in order to give this right, must be produced to the jury (*r*). Where several prisoners are jointly indicted, and one of them calls witnesses, it seems that the counsel for the prosecutor may reply generally, if the charge be a joint one, though, if the charges be separate, as for stealing and receiving, he should confine his remarks to the case of the party for whom witnesses have appeared (*s*). "If the only evidence called on the part of a prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper to do so" (*t*). Whether the counsel for the plaintiff or the prosecution will be entitled to reply, if the defendant, without adducing evidence, opens new facts, is a point which is not yet clearly decided; but the better opinion is, that no such right can be claimed, though the judge in his discretion might, in a flagrant case, permit its exercise (*u*).

§ 287. On the trial of *public prosecutions*, whether for felony or misdemeanor, *instituted by the Crown*, the law officers of the

(*p*) Pullen v. White, 3 C. & P. 434, per Best, C. J.

(*q*) Dowling v. Finigan, 1 C. & P. 587, per Best, C. J.

(*r*) Harvey v. Mitchell, 2 M. & Rob. 366, per Parke, B.; Dover v. Maestaer, 5 Esp. 96, per Lord Ellenborough. See ante, § 21.

(*s*) R. v. Hayes, 2 M. & Rob. 155, per Parke, B., and Coltman, J. See R. v. Jordan, 9 C. & P. 118, where A. was charged with rape, and B. with abetting. B. called a witness to prove an alibi for A. Held that, in strictness, the counsel for the prosecution might reply on the whole case, but that it was *summun jus*, per Williams, J.

(*t*) Resolution of the judges, 7 C. & P. 676.

(*u*) Crerar v. Sodo, M. & M. 85, per Lord Tenterden; 3 C. & P. 10, S. C. See, in favour of the right, R. v. Horne, 20 How. St. Tr. 664; R. v. Bignold, 4 D. & R. 70; R. v. Carlile, 6 C. & P. 643, per Park, J.; Best "*On Right to Begin*," 92—94; against it, Best "*On Right to Begin*," 94—99; Faith v. M'Intyre, 7 C. & P. 44, per Parke, B.; Stephens v. Webb, 7 C. & P. 60; R. v. Abingdon, Pea. R. 236, per Lord Kenyon. *Wick v. Brown 2. C. & P. 219*

Crown and those who represent them, are in strictness entitled to reply, although no evidence is adduced on the part of the defendant (*v*); but as this is a privilege, or rather a prerogative, which stands opposed to the ordinary practice of the courts, the true friend of justice will do well to watch with jealousy the parties who are entitled to exercise it. Mr. Horne, so long back as the year 1777, properly observed, that the Attorney-General would be grievously embarrassed to produce a single argument of reason or justice in behalf of his claim (*w*); and when we reflect that the rule, precluding the counsel for the prosecution from addressing the jury in reply, where the defendant has called no witnesses, has been long deemed the best method for obtaining justice, and has, consequently, been established as the law of the land, it raises a rational suspicion in the mind, that a contrary method may have been adopted, and may still be followed, for a different and less legitimate purpose. It is to be hoped that, ere long, this question will receive that consideration which its importance demands, and that the legislature, by an enlightened interference, will introduce one uniform practice in the trial of political and ordinary offenders (*x*).

(*v*) Resolution of the judges, 7 C. & P. 676; *R. v. Horne*, 20 How. St. Tr. 664, per Lord Mansfield; *R. v. Marsden*, M. & M. 439, per Lord Tenterden.

(*w*) 20 How. St. Tr. 663.

(*x*) Those who wish for fuller information respecting the subjects discussed in this chapter, are referred to the sensible and careful work of Mr. Best "*On the Right to Begin*."

CHAPTER IV.

OF THE BEST EVIDENCE.

§ 288. THE FOURTH RULE, which governs the production of evidence, requires that *the best evidence, of which the case, in its nature, is susceptible*, should always be presented to the jury. This rule does not demand the greatest amount of evidence, which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent, that better evidence is withheld, it is fair to presume, that the party has some sinister motive for not producing it, and that, if offered, his design would be frustrated (*a*). The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant, that no evidence shall be received, which is merely substitutionary in its nature, so long as the original evidence is attainable (*b*). Thus, depositions are, in general, admissible, only after proof that the parties who made them cannot themselves be produced (*c*). So, a title by deed must be proved by the production of the deed itself, if it is within the power of the party; for this is the best evidence of which the case is susceptible; and its non-production would raise a presumption, that it contained some matter of defeasance. If there be duplicate originals of a deed, all must be accounted for, before secondary evidence can be given of any one (*d*). Again, if a deed, or other attested instrument be produced, its execution must, in general, be proved by calling the

(*a*) See per Best, C. J., in *Strother v. Barr*, 5 Bing. 151; per Holroyd, J., in *Brewster v. Sewell*, 3 B. & A. 302.

(*b*) 1 Phil. Ev. 418; 1 St. Ev. 500; Glassf. Ev. 266—278; *Tayloe v. Riggs*, 1 Peters, 591, 596; *U. S. v. Reyburn*, 6 Peters, 352, 367; *Minor v. Tillotson*, 7 Peters, 100, 101.

(*c*) B. N. P. 239.

(*d*) *Alivon v. Furnival*, 1 C. M. & R. 202, per Parke, B.

subscribing witness; and if there be several such witnesses, it will not be sufficient, so long as any one of them is alive, sane, free from permanent sickness, within the jurisdiction of the Court, and capable of being found by diligent inquiry, to prove the signature of another deceased witness to the attestation; for such evidence would merely *raise a presumption* that the party deceased had witnessed all which the law requires for the due execution of a deed; whereas the surviving witness would have been able to *give direct proof* whether all the requisites of the law had been observed or not. Such direct testimony, therefore, might fairly be considered as evidence of a better and higher nature, than mere presumption arising from the proof of the witness's handwriting (*e*).

§ 289. The rule under discussion excludes only that evidence, which *itself indicates the existence of more original sources* of information; and therefore, when there is no substitution of inferior evidence, but only a selection of weaker, instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed (*f*). For instance, if there are several subscribing witnesses to a deed or will, it is only necessary at law to call one of them, though the others also are at hand; and the same rule prevails in equity, excepting in the case of wills (*g*). Even the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor (*h*). So, in proof or disproof of handwriting, or in proof of the contents of a letter, which cannot be produced, it is not necessary to call the supposed writer (*i*). Neither is it necessary to call the magistrate who signed, or the clerk who took down, the depositions against a prisoner; but it will be sufficient, at the trial, to prove the signature of the magistrate, and the identity of the prisoner, since the Court will presume that the examination was conducted according to the form

(*e*) *Wright v. Doe d. Tatham*, 1 A. & E. 21, 22, per Tindal, C. J.

(*f*) 1 Ph. Ev. 418.

(*g*) *Ansty v. Dowding*, 2 Stra. 1253; B. N. P. 264; *Gresley Ev.* 120, 122, 123.

(*h*) *Wright v. Doe d. Tatham*, 1 A. & E. 3.

(*i*) *R. v. Hurley*, 2 M. & Rob. 473; *Hughes' case*, 2 East, P. C. 1002; *M'Guire's case*, id.; *R. v. Benson*, 2 Camp. 508; *Liebman v. Pooley*, 1 Stark. R. 167; *Bank Prosecutions*, R. & R. 378.

prescribed by the statutes (*j*). In serious cases, however, it will be highly expedient to examine the magistrate himself, since his direct testimony cannot fail to be far more satisfactory than any mere presumption of law (*k*). Even where it is necessary to prove negatively that an act was done without the consent, or against the will, of another, the person, whose will or consent is denied, need not, as we have seen, be himself called (*l*).

§ 290. This rule naturally leads to the division of evidence into PRIMARY and SECONDARY. *Primary evidence* is that which we have just mentioned, as the best or highest evidence, or that kind of proof which the law recognises, as affording the greatest certainty of the fact in question. Until it is shown, that the production of this evidence is out of the party's power, no other proof of the fact is, in general, admitted. All evidence falling short of this, in its degree, is termed *secondary*. The question, whether evidence is primary or secondary, has reference to the nature of the case, in the abstract, and not to the peculiar circumstances under which the party, in the particular cause on trial, may be placed. It is a distinction of law, and not of fact; referring only to the *quality*, and not to the *strength* of the proof. Evidence, which carries on its face no indication that better remains behind, is not secondary, but primary. And though all information must, if possible, be traced to its fountain head, yet if there are several distinct sources of information of the same fact, it is not, in general, necessary to show that they have all been exhausted, before recourse can be had to secondary evidence with respect to one of them (*m*).

§ 291. For instance, if a collector, who is a stranger to the suit, has received certain sums of money, and it be necessary to establish

(*j*) *R. v. Foster*, 7 C. & P. 148, per Alderson, B., and Bosanquet, J.; *R. v. Pickesley*, 9 C. & P. 124, per Parke, B. (*k*) *R. v. Pickealey*, 9 C. & P. 124.

(*l*) Ante, § 273; *R. v. Hazy*, 2 C. & P. 458; *R. v. Allen*, 1 Moo. C. C. 154; *R. v. Hurley*, 2 M. & Rob. 473, where held that, on indictment for forging a cheque, the party, whose name is supposed to be forged, need not be called, either to disprove the handwriting, or to show that he did not authorise any other party to use his name.

(*m*) *Cutbush v. Gilbert*, 4 Serg. & Raw. 555; *U. S. v. Gibert*, 2 Sumn. 19, 80, 81; 1 Ph. Ev. 421.

that fact, it is obvious that the affirmative may be proved, by calling either the collector himself, or the parties who paid him, and both these modes of proof are equally primary. But suppose the collector be dead; in this case the only primary evidence is the testimony of the persons from whom the money was received. Still the law does not require the production of these persons, but, on proof of the collector's death, will admit any entries in his book acknowledging the receipt, though such entries are merely secondary evidence of the fact in issue; and if the book be in the hands of the opposite party, who, after notice, refuses to produce it, even secondary evidence of its contents will be admissible (n). The distinction between this case, and that of the subscribing witnesses to an instrument, where, as we have seen (o), proof must be given that all the witnesses are unable to be called, before evidence of the handwriting of one of them can be received, seems to rest on this, that, in attested instruments, the witnesses are either rendered necessary by statute, or at least have been solemnly chosen by the parties, as the persons on whose united testimony they wish to rely, and, consequently, so long as one of them can be called, secondary evidence respecting the others cannot be admitted.

§ 292. The cases which most frequently call for the application of the rule now under consideration, are those which relate to the *substitution of oral for written evidence*, and the general rule of law with respect to this subject is, that *the contents of a written instrument, which is capable of being produced, must be proved by the instrument itself, and not by parol evidence (p)*. This rule, which is as old as any part of the common law of England, has ever been regarded with favour, and mentioned with approbation by the judges. "I have always," said Lord Tenterden, "acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement

(n) *Middleton v. Melton*, 10 B. & C. 322, 327, 328, per Bayley and Parkes, Js.; *Barry v. Bebbington*, 4 T. R. 514.

(o) *Ante*, § 288.

(p) *The Queen's case*, 2 B. & B. 289.

of the rule" (g). Lord Wynford, also, in another case, observes : "I seldom pass a day in a *Nisi Prius* court without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, and too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced ; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents, unless the instrument be proved to have been lost" (r). One of the main reasons for the adoption of this rule is, that the Court may acquire a knowledge of the whole contents of the instrument, which may have a very different effect from the statement of a part (s). It cannot be denied but that these authorities and reasons are entitled to the greatest weight, and the rule in general is undoubtedly a wise one ; but those who watch its practical working, must be strangely prejudiced in its favour, if they are blinded to the cruel injustice which a strict observance of it too frequently entails upon parties, in consequence of the oppressive operation of the stamp laws (t).

§ 293. The cases on this subject may be arranged into three classes ; including in the *first* class those instruments which the law requires should be in writing ; in the *second*, those contracts which the parties have put in writing ; and in the *third*, all other writings, the existence or contents of which are disputed, and which are material, either to the issue, or to the credit of the witnesses. And, *first*, oral evidence cannot be substituted for any *instru-*

(g) *Vincent v. Cole*, M. & M. 258.

(r) *Strother v. Barr*, 5 Bing. 151.

(s) *The Queen's case*, 2 B. & B. 287.

(t) See per Lord Tenterden, in *Reid v. Batte*, M. & M. 414.

ment which the law requires to be in writing; such as records, public and judicial documents, official examinations, deeds of conveyance of lands, wills, other than nuncupative, acknowledgments under Lord Tenterden's act, promises to pay the debt of another, and other writings mentioned in the statute of frauds. In all these cases the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, as long as the writing exists, and is in the power of the party. Thus, for example, parol evidence is inadmissible to prove on what day a trial at Nisi Prius came on (*u*), or even that it took place at all; but the record, or at least the *postea*, must be produced (*v*). So, the date of a party's apprehension for a particular offence cannot be shown by parol, the warrant for apprehension or committal being superior evidence (*w*). So, also, parol evidence cannot be received of the statement of a prisoner before the magistrate, where the examination has, in conformity with the act of 7 Geo. 4, c. 64, in England, or the act of 9 Geo. 4, c. 54, in Ireland, been reduced into writing, and subscribed, and returned by the justice (*x*). If, however, the written examination is excluded for informality (*y*), other than for having been taken on oath, in which case the confession is inadmissible as not having been voluntarily made (*z*),—or if the statement was not reduced into writing, parol evidence is admissible to prove what was said by the prisoner, for such evidence is offered, not in substitution of the official document, since no such document in that case exists, but as the best evidence which the circumstances admit of being produced. So, if the prisoner was examined on two occasions, or with reference to two offences, and the examination, subscribed by the magistrate, relates only to what occurred on one occasion (*a*),

(*u*) *Thomas v. Analey*, 6 Esp. 80, per Lord Ellenborough; *R. v. Page*, id. 83, per Lord Kenyon.

(*v*) B. N. P. 243; *R. v. Iles*, Hard. 118; *R. v. Browne*, M. & M. 319; 3 C. & P. 572, S. C. (*w*) *R. v. Phillips*, R. & R. 369.

(*x*) *R. v. Fearshire*, 1 Lea. C. C. 202; *R. v. Jacobs*, id. 309. See further as to this subject, post, Chapter *On Confessions*.

(*y*) *R. v. Reed*, M. & M. 403, per Tindal, C. J.

(*z*) *R. v. Wheeley*, 8 C. & P. 250, per Alderson, B.; *R. v. Rivers*, 7 C. & P. 177, per Park, J.

(*a*) *R. v. Wilkinson*, 8 C. & P. 662, per Parke, B., and Littledale, J.

or with respect to one offence (*b*), the prosecutor may call any party, who can speak to statements made by the prisoner in that part of the inquiry not included in the written examination. In like manner, if a witness, having given a written deposition in a cause, has afterwards testified orally in court, parol evidence may, in the event of his death, be given of his *vivâ voce* testimony, notwithstanding the existence of the deposition (*c*); for in this last case there are evidently two independent sources of information, and the party, relying on the evidence, may at his discretion have recourse to either.

§ 294. In the *second* place, oral proof cannot be substituted for the *written evidence of any contract which the parties have put in writing*. Here the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and in all cases of written contracts, the writing is tacitly considered, by the parties themselves, as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction (*d*); and, consequently, in all proceedings, civil or criminal, in which the issue depends in any degree upon the terms

(*b*) *R. v. Harris*, 1 Moo. C. C. 338.

(*c*) *Tod v. E. of Winchelsea*, 3 C. & P. 387, per Lord Tenterden.

(*d*) See *R. v. Castle Morton*, 3 B. & A. 590, per Abbott, C. J. The principles, on which a writing is deemed part of the essence of any transaction, and consequently the best or primary proof of it, are thus explained by Domat:—"The force of written proof consists in this; men agree to preserve by writing the remembrance of past events, of which they wish to create a memorial, either with the view of laying down a rule for their own guidance, or in order to have, in the instrument, a lasting proof of the truth of what is written. Thus contracts are written, in order to preserve the memorial of what the contracting parties have prescribed for each other to do, and to make for themselves a fixed and immutable law, as to what has been agreed on. So, testaments are written, in order to preserve the remembrance of what the party, who has a right to dispose of his property, has ordained concerning it, and thereby lay down a rule for the guidance of his heir and legatees. On the same principle are reduced into writing all sentences, judgments, edicts, ordonnances, and other matters, which either confer title, or have the force of law. The writing preserves, unchanged, the matters intrusted to it, and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves, that is, by the inspection of the originals."—See Domat's Civil Law, Liv. 3, tit. 6, § 2, as translated in 7 *Monthly Law Mag.* p. 73.

of a contract, the party whose witnesses show that it was reduced to writing, must either produce the instrument duly stamped, or give some good reason for not doing so. Thus, for example, if in an action of ejectment against an overholding tenant, or in an action for the use and occupation of real estate, it should appear either on the direct or cross examination of the plaintiff's witnesses, that there was a written contract of tenancy, the plaintiff must either produce it properly stamped, or account for its absence (e). So, where a landlord brought an action against a tenant for rent and non-repair, and it appeared that the parties had agreed by parol that the tenant should hold the premises on the terms contained in a former lease between the landlord and a stranger, a nonsuit was directed, the lease on production being stamped as an agreement, and being therefore inadmissible (f).

§ 295. The same strictness in requiring the production of the written instrument has prevailed, where the question at issue was simply what amount of rent was reserved by the landlord (g), or who was the actual party to whom a demise had been made (h), or under whom the tenant came into possession (i); and in an action for the price of labour performed, where it appeared that the work was commenced under an agreement in writing, but the plaintiff's claim was for extra work, it has been several times held that, in the absence of positive proof that the work in question was separate from that included in the agreement, and was in fact done under a distinct order, the plaintiff was bound to produce the original agreement, since it might furnish evidence, not only that the items sought to be recovered were not included therein, but also of the rate of remuneration which the parties had agreed upon (j). So, where an auctioneer delivered to a bidder, to whom

(e) *Brewer v. Palmer*, 3 Esp. 213, per Lord Eldon; *Fenn v. Griffith*, 6 Bing. 533; 4 M. & P. 299, S. C.; *Henry v. Marq. of Westmeath*, Ir. Cir. R. 809, per Richards, B.; *Thunder v. Warren*, 8 Ir. Law R. 181; *Rudge v. M'Carthy*, 4 id. 161.

(f) *Turner v. Power*, 7 B. & C. 625; M. & M. 131, S. C.

(g) *R. v. Merthyr Tidvil*, 1 B. & Ad. 29.

(h) *R. v. Rawden*, 8 B. & C. 708; 3 M. & R. 426, S. C.

(i) *Doe v. Harvey*, 8 Bing. 239; 1 M. & Sc. 374, S. C.

(j) *Vincent v. Cole*, M. & M. 257, per Lord Tenterden; 3 C. & P. 481, S. C.;

lands were let by auction, a written paper *signed by himself*, containing the terms of the lease, the landlord was held bound, in an action for use and occupation, to produce this paper duly stamped, as a memorandum of an agreement (*k*). In *Whitford v. Tutin* (*l*), the plaintiff had been employed as secretary to the committee of a charitable society, pursuant to a resolution entered in the book of the committee, of which, during his service, he had had the care. The society being afterwards dissolved, the plaintiff sued some of the members of the committee for his salary, and the Court held that he was bound to produce the book under which he was engaged; for though he was no party to the original resolution, which was entered into before his appointment as secretary, yet by accepting the situation and the benefit attached to it, he must be taken to have adopted the terms contained in the resolution, and consequently was bound to produce the book to show what these terms really were. Whether, in an action on the case for an injury done to the plaintiff's reversion, his interest as reversioner may be proved by the parol testimony of the tenant, when it appears that the premises are occupied under a written agreement, may admit of some doubt. In one case it was held that the agreement must be produced (*m*); but in a later case, where nominal damages only were recovered, and independent proof was given of the premises having been devised to the plaintiff, the Court were equally divided upon the question whether a nonsuit should be entered, the plaintiff having omitted to produce the written agreement between the occupier and himself (*n*).

§ 296. The fact that, in cases of this kind, the writing is in the

Buxton v. Cornish, 1 Dowl. & L. 585; 12 M. & W. 426, S. C.; *Jones v. Howell*, 4 Dowl. 176; *Holbard v. Stephens*, 5 Jurist, 71, Bail C., per Williams, J.; *Parton v. Cole*, 6 Jurist, Bail C., per Patteson, J. See *Reid v. Batte*, M. & M. 413, cited post, § 297.

(*k*) *Ramsbottom v. Mortley*, 2 M. & Sel. 445. See *Ramsbottom v. Tunbridge*, id. 434, cited post, § 298. See also *Hawkins v. Warre*, 3 B. & C. 697, where Abbott, C. J., draws the distinction between papers signed by the parties or their agents, and those which are unsigned.

(*l*) 10 Bing. 395; 4 M. & Sc. 166, S. C.

(*m*) *Cotterill v. Hobby*, 4 B. & C. 465.

(*n*) *Strother v. Barr*, 5 Bing. 136, Best, C. J., and Burrough, J., in favour of nonsuit; *Park and Gaselee, Js.*, cont.; 2 M. & P. 207, S. C.

possession of the adverse party, does not change its character; it is still the primary evidence of the contract; and its absence must be accounted for by notice to the other party to produce it, or in some other legal mode, before secondary evidence of its contents can be received. In all these cases, however, if the plaintiff can establish a *prima facie* case, without betraying the existence of a written contract relating to the subject-matter of the action, he cannot be precluded from recovering by the defendant subsequently giving evidence of an unstamped agreement; but the defendant, if he means to rely on a valid contract, must produce it properly stamped; and no material distinction will be recognised in his favour, though a notice to produce the document has been served on the plaintiff (o). In an action of ejectment it has been even held, that the landlord could not be turned round by one of his witnesses proving, on cross-examination, that an agreement, which he only knew *related in some way to the land in question*, was produced at a former trial between the same parties, and on the morning of the then trial, was seen in the hands of the plaintiff's attorney; for the Court held that, in order to exclude parol evidence of the tenancy, it should appear that the agreement was between the same parties, and was binding at the time of the second trial; neither of which facts was proved (p).

§ 297. Where the written communication or agreement between the parties is *collateral* to the question in issue, it need not be produced. Thus, if during an employment under a written contract, a verbal order is given for separate work, the workman can, perhaps, recover from his employer the price of this work, without producing the original agreement, provided he can show distinctly that the items, for which he seeks remuneration, were not included therein; as, for instance, if it clearly appears that, whilst certain work was in progress in the inside of a house under a written agreement, a verbal order was given to execute some alterations or improvements on the outside (q). So, if the fact

(o) *Magnay v. Knight*, 1 M. & Gr. 944; 2 Scott, N. R. 64, S. C.; *Stephens v. Pinney*, 8 Taunt. 327; 2 B. Moore, 349, S. C.; *Marston v. Dean*, 7 C. & P. 13; *Fry v. Chapman*, 5 Dowl. 265; *R. v. Padstow*, 4 B. & Ad. 208; 1 N. & M. 9, S. C.; *Reed v. Deere*, 7 B. & C. 261, 266.

(p) *Doe v. Morris*, 12 East, 237.

(q) *Reid v. Batte*, M. & M. 413, per Lord Tenterden; commented on by

of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness, who has seen the tenant occupy, notwithstanding it appears that the occupancy was under an agreement in writing (*q*); and where a tenant holds land under written rules, but the length of his term is agreed on orally, the landlord need not produce these rules in an action of trespass under a plea denying his possession, because such plea only renders it necessary for the plaintiff to prove the extent of the tenant's term, which, having been agreed to by parol, does not depend upon the written rules (*r*). The fact of partnership may also be proved by parol evidence of the acts of the parties, without producing the deed (*s*).

§ 298. So where, at the time of letting some premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes (*t*);—and where, upon a like occasion, a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over, and assented to by the tenant, who agreed to bring a surety and sign the agreement on a future day, but omitted to do so (*u*);—and where, in order to avoid mistakes, the terms upon which a house was let, were, at the time of letting, reduced to writing by the lessor's agent, and signed by the wife of the lessee, in order to bind him; but the lessee himself was not present, and did not appear to have constituted the wife as his

Patteson, J., in *Parton v. Cole*, 6 Jurist, Bail C. 370. See *Vincent v. Cole*, M. & M. 257, and cases cited ante, § 295, n. (*j*).

(*q*) *R. v. Holy Trinity*, Hull, 7 B. & C. 611; 1 M. & R. 444, S. C.; *Doe v. Harvey*, 8 Bing. 239, 242; 1 M. & Sc. 374, S. C.; *Spiers v. Willison*, 4 Cranch, 398; *Dennett v. Crocker*, 8 Greenl. 239, 244. See, however, the observations of Best, C. J., on the case of *R. v. Holy Trinity*, in *Strother v. Barr*, 5 Bing. 158, 159.

(*r*) *Hey v. Moorhouse*, 6 Bing. N. C. 52; 8 Scott, 156, S. C.

(*s*) *Alderson v. Clay*, 1 Stark. R. 405, per Lord Ellenborough.

(*t*) *Trewhitt v. Lambert*, 10 A. & E. 470; 3 P. & D. 676, S. C. See *Drant v. Brown*, 3 B. & C. 665; 5 D. & R. 582, S. C.; and *Bethell v. Blencowe*, 3 M. & Gr. 119, where the Court held that written proposals, made pending a negotiation for a tenancy, might be admitted, without a stamp, as proving one step in the evidence of the contract.

(*u*) *Doe v. Cartwright*, 3 B. & A. 326. See *Hawkins v. Warre*, 3 B. & C. 690; 5 D. & R. 512, S. C.

agent, or to have recognised her act, further than by entering upon and occupying the premises (*v*);—and where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer, containing the terms of the letting, but this paper was never signed either by the auctioneer, or by the parties (*w*);—and where, on the occasion of hiring a servant, the master and servant went to the chief constable's clerk, who in their presence, and by their direction, took down in writing the terms of the hiring, but neither party signed the papers, and it did not appear that it was read to them (*x*);—in all these instances the Court held that parol evidence was admissible, since the writings only amounted, either to mere unaccepted proposals, or to minutes capable of conveying no definite information to the Court or jury, and could not, by any sensible rule of interpretation, be construed as memoranda, which the parties themselves intended to operate as fit evidence of their several agreements.

§ 299. On the same principle it has frequently been held, that where the action is not directly upon the agreement for nonperformance of its terms, but is in tort, for its conversion, or detention, or negligent loss, the plaintiff may give parol evidence, descriptive of its identity, without giving notice to the defendant to produce the document itself (*y*); and even though the defendant be willing to produce it without notice, the plaintiff is not bound to put it in, but may leave his adversary to do so, if he think fit, as part of his case (*z*). It has been well observed, that, for the purpose of identification, no distinction can be drawn between written instruments and other articles;—between trover for a promissory note, and trover for a waggon and horses (*a*).

(*v*) *R. v. St. Martin's*, Leicester, 2 A. & E. 210; 4 N. & M. 202, S. C.

(*w*) *Ramsbottom v. Tunbridge*, 2 M. & Sel. 434. See *Ramsbottom v. Mortley*, 2 M. & Sel. 445, cited ante, § 295.

(*x*) *R. v. Wrangle*, 2 A. & E. 514. See, for other instances, *Ingram v. Lea*, 2 Camp. 521; *Dalison v. Stark*, 4 Esp. 163; *Wilson v. Bowie*, 1 C. & P. 8.

(*y*) *Scott v. Jones*, 4 Taunt. 865; *How v. Hall*, 14 East, 274; *Bucher v. Jarratt*, 3 B. & P. 143; *Read v. Gamble*, 10 A. & E. 597; *Ross v. Bruce*, 1 Day, 100; *The People v. Holbrook*, 13 Johns. 90; *M'Lean v. Hertzog*, 6 Serg. & R. 154. These cases overrule *Cowan v. Abrahams*, 1 Esp. 50.

(*z*) *Whitehead v. Scott*, 1 M. & Rob. 2, per Lord Tenterden.

(*a*) *Jolley v. Taylor*, 1 Camp. 143, per Sir James Mansfield.

§ 300. The same rule prevails in criminal cases; and therefore, if a person be indicted for stealing a bill or other written instrument, its identity may be proved by parol evidence, though no notice to produce it has been served on the prisoner or his agent (*b*). If, however, the indictment be for forgery, and the forged instrument be in the hands of the prisoner, the prosecutor must serve him or his attorney with a notice to produce it, before he can offer secondary evidence of its contents (*c*); though, if the instrument be produced, the prisoner cannot object to its being read, on the ground of its wanting a proper stamp (*d*). One ground of difference between these two cases appears to be, that, in the first, it will be sufficient, both in the indictment and the proof, to describe in very general terms the instrument stolen, whereas in the case of forgery, the prosecutor will often be required to enter into a minute description of the document alleged to have been forged (*e*). But the main reason why parol evidence is admissible in a case of larceny, though inadmissible in a case of forgery, is that a person, charged with stealing an instrument, must know, from the very nature of the accusation, that he will be called upon to produce it, while an indictment for forgery furnishes no such intimation; and we shall presently see, when we discuss the rules which regulate the serving of notices to produce (*f*), that this is a material distinction. Indeed, it may well admit of a doubt, whether all the cases cited in this and the preceding section, wherein parol evidence has been received, do not rest on those rules, rather than on the fact that the contents of the writings were collateral to the questions in issue.

§ 301. In the *third* place, oral evidence cannot be substituted for *any writing, the existence or contents of which are disputed*, and which is *material, either to the issue between the parties, or to the credit of the witnesses*, and is not merely the memorandum of some other fact. Thus, a witness cannot be asked whether certain

(*b*) *R. v. Aickles*, 1 Lea. 294, 297, n. (*a*), 300, n. (*a*).

(*c*) *R. v. Haworth*, 4 C. & P. 254, per Parke, J.

(*d*) Per Abbott, C. J., in *R. v. Castle Morton*, 3 B. & A. 589.

(*e*) See *Bucher v. Jarratt*, 3 B. & P. 146, per Chambre, J.

(*f*) Post, § 333.

resolutions were published in the newspapers (*g*), neither can he be questioned as to the contents of his account books (*h*); but in both these cases the papers and the books, as being the best evidence, must be produced. So, doubts have been entertained, as to whether the contents of handbills, written by dictation at a meeting of conspirators, could be proved by oral testimony (*i*). So, the fact of rating cannot be legally proved without the production of the rate-books (*j*). So, also, as we shall hereafter see (*k*), a witness, on cross-examination, cannot be asked whether he has made certain statements in writing; but the proper course is to put the document into his hands, and ask him whether he wrote it.

§ 302. In stating that oral testimony cannot be substituted for any writing included in either of the three classes above mentioned, a tacit *exception* must be made in favour of the *parol admissions* of a party, and of his *acts amounting to admissions*, both of which species of evidence are always received as primary proof against himself and those claiming under him, although they relate to the contents of a deed or other instrument, which are directly in issue in the cause (*l*). "The reason why such statements or acts are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so" (*m*). It

(*g*) *R. v. O'Connell*, Arm. & Trev. R. 163.

(*h*) *Id.* 198.

(*i*) *R. v. Thistlewood*, 33 How. St. Tr. 756—759. See post, § 306.

(*j*) *R. v. Coppull*, 2 East, 25, recognised by Patteson, J., in *R. v. Staple Fitzpaine*, 2 Q. B. 494.

(*k*) See Chapter *On Examination of Witnesses*.

(*l*) *Earle v. Picken*, 5 C. & P. 542, per Parke, B.; *Newhall v. Holt*, 6 M. & W. 662, per id.; *Slatterie v. Pooley*, id. 664, and cases cited in note (*a*), 669; *Bethell v. Blencowe*, 3 M. & Gr. 119; *Howard v. Smith*, id. 254; 3 Scott, N. R. 574, S. C.; *R. v. Welch*, 2 C. & Kir. 296. These cases overrule Lord Tenterden's decision in *Bloxam v. Elsie*, 1 C. & P. 558; Ry. & M. 187, S. C. See *Fox v. Waters*, 12 A. & E. 43.

(*m*) Per Parke, B., in *Slatterie v. Pooley*, 6 M. & W. 669.

may seem presumption to question the correctness of this reasoning, and of the decisions founded upon it; but we cannot refrain from observing, that, although the admission of a party may fairly be presumed to be true, the parol evidence by which that admission is proved need by no means be so; and, indeed, such testimony is open to precisely the same objection as applies to the ordinary case, where secondary evidence is produced, and the best evidence is withheld. If the admission were made in court, it might then be allowed to render unnecessary the production of the written instrument to which it refers, because the simple question in such case would be, is the admission true? and the rational presumption is, that a man will not tell a falsehood, which is against his own interest; but where a witness is called to say that he has heard the opposite party make a certain statement, with respect to the contents of a written instrument, the further question arises, was this statement really made? and to permit such parol evidence to be equally admissible, as proof of the contents of the instrument, with the production of the instrument itself, is to open a vast field for misapprehension, perjury, and fraud, which would be wholly closed, if the salutary rule of law, requiring that what is in writing should be proved by the writing itself, were here, as in other cases, to prevail. It must be remembered, that Lord Tenterden, no mean authority, has emphatically expressed an opinion in support of the view here suggested (*m*); while Mr. Baron Parke himself has declared that the parol evidence of admissions may, in some cases, be quite unsatisfactory to a jury (*n*), and that too great weight ought never to be attached to such evidence, since it frequently happens that the witness not only has misunderstood what the party has said, but, by unintentionally altering a few of the expressions really used, has given to the statement an effect completely at variance with what was intended (*o*).

§ 303. Since the above observations were written, the subject has undergone much discussion in Ireland (*p*), where the judges have

(*m*) *Bloxam v. Elsie*, Ry. & M. 188.

(*n*) In *Slatterie v. Pooley*, 6 M. & W. 669.

(*o*) Note to *Earle v. Picken*, 5 C. & P. 542.

(*p*) *Lawless v. Queale*, 8 Ir. Law R. 382. See also *Lord Gosford v. Robb*, id. 217.

not hesitated to declare their disapproval of the principles advanced in *Slatterie v. Pooley* (q). "The doctrine laid down in that case," said Chief Justice Pennefather, "is a most dangerous proposition; by it a man might be deprived of an estate of 10,000*l.* per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise incumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty" (r). The case which called forth these remarks was an action for use and occupation. At the trial, one of the plaintiff's witnesses, after proving the occupation of the premises by the defendant, acknowledged in cross-examination, the existence of a written agreement; and the Court held, that this agreement must be produced, though the defendant had admitted that he was tenant at a particular rent.

* § 304. Whether the doctrine propounded in *Slatterie v. Pooley* would be held to extend to records, as well as to deeds and ordinary writings, and whether it would embrace the case of a *confessio juris*, as well as that of a *confessio facti*, may admit of some doubt. In one case before Lord Ellenborough, the admission of a party that he had been discharged under the Insolvent Debtors Act, was held insufficient evidence of a valid discharge, because the judicial document, on being produced, might be found irregular and void, and the party might be mistaken (s); but, on a late indictment for bigamy, it was held that the prisoner's deliberate declaration, that he had been married in a foreign country, rendered it unnecessary to prove that the marriage had been celebrated according to the laws of that country (t). It may be further observed, with respect to this exception, that there is a material

(q) 6 M. & W. 664.

(r) *Lawless v. Queale*, 8 Ir. Law R. 385.

(s) *Scott v. Clare*, 3 Camp. 236. See also *Summersett v. Adamson*, 1 Bing. 73; *Jenner v. Jolliffe*, 6 Johns. 9; *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

(t) *R. v. Newton*, 2 M. & Rob. 503, per Wightman and Cresswell, Js.; 1 C. & Kir. 164, S. C., nom. *R. v. Simmonsto*.

difference between proving, by means of an admission, the execution of an attested instrument, which is produced, and proving the party's admission, that by a written instrument, which is not produced, a certain act was done; and, indeed, it still appears to be the law, as we shall hereafter show (*u*), that, when an attested instrument is in court, and its execution is to be proved against a hostile party, an admission on his part of due execution, unless made with a view to the trial of that cause, is not sufficient. This rule is founded on reasons peculiar to the class of cases to which it is applied.

§ 305. Where the writing does not fall within either of the three classes already described, there is no ground for its excluding oral evidence. As, for example, if a written communication be *accompanied* by a verbal one to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it (*v*). Thus, also, the payment of money may be proved by oral testimony, though a receipt be taken (*w*); in trover, a verbal demand of the goods is admissible, though a demand in writing was made at the same time (*x*); and the admission of a debt is proveable by oral testimony, though a written promise to pay was simultaneously given (*y*). Where, on a preliminary hearing of a charge, the magistrate's clerk takes down what the witness says, but neither witness nor magistrate signs the writing, nor does it constitute part of the depositions returned, oral evidence of what passed on that occasion is equally admissible with the clerk's note (*z*); and the same rule will prevail, if, on the hearing of an information for a trespass in pursuit of game (*a*), the clerk takes a note of the charge; because this is not one of those cases where the magistrate is bound to take down what the witnesses say (*b*). So, the fact of birth, baptism, marriage, death, or burial, may be proved by parol testimony,

(*u*) In Chapter *On Private Writings*, post.

(*v*) See ante, § 293, at the end.

(*w*) *Rambert v. Cohen*, 4 Esp. 213; *Jacob v. Lindsay*, 1 East, 460.

(*x*) *Smith v. Young*, 4 Camp. 439, per Lord Ellenborough.

(*y*) *Singleton v. Barrett*, 2 C. & Jer. 368.

(*z*) *Jeans v. Wheedon*, 2 M. & Rob. 486, per Cresswell, J.

(*a*) Under 1 & 2 Will. 4, c. 32, § 30.

(*b*) *Robinson v. Vaughton*, 8 C. & P. 252, per Alderson, B.

though a narrative or memorandum of these events may have been entered in registers, which the law requires to be kept; for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care (*c*).

§ 306. On a somewhat similar ground it has been held, that in prosecutions for political offences, such as treason, conspiracy, and sedition, the *inscriptions* on flags and banners paraded in public, and the contents of *resolutions* read at a public meeting, may be proved, as being of the nature of speeches, by oral testimony (*d*); and where a party was indicted for administering an unlawful oath, a witness was permitted to give parol evidence of the words used, though he stated his belief that the accused read the words from a paper, which he held in his hand when he administered the oath, and no notice to produce this paper had been served on the prisoner (*e*).

§ 307. We have hitherto confined our observations to those cases where the attempt has been made to substitute oral for written evidence; but precisely the same rules operate to the *exclusion of writings, which the law considers as entitled to less weight* than those which might, and consequently ought to, be forthcoming. Thus, an original document must, subject to some exceptions that will be presently mentioned (*f*), be produced at the trial, and a mere *copy*, however accurate, will not, in the first instance, be admissible (*g*). If, then, it be necessary to show

(*c*) *Evans v. Morgan*, 2 C. & Jer. 453; *R. v. Allison*, R. & R. 109; *Reed v. Passer*, Pea. R. 232; *St. Devereux v. Much Dew Church*, 1 W. Bl. 367; *Morris v. Miller*, id. 632; 4 Burr. 2067, S. C.; *Birt v. Barlow*, 1 Doug. 172; *Com. v. Norcross*, 9 Mass. 492; *Ellis v. Ellis*, 11 Mass. 92; *Owings v. Wyant*, 1 Har. & M'H. 393.

(*d*) *R. v. Hunt*, 3 B. & A. 566; *Sheridan and Kirwan's case*, 31 How. St. Tr. 673; *R. v. O'Connell*, Arm. & Trev. R. 235—237. See ante, § 301, n. (*i*).

(*e*) *R. v. Moors*, 6 East, 421, note.

(*f*) Post, § 312.

(*g*) B. N. P. 293, 294.

the contents of a manuscript which is in the possession of the opposite party, a paper, purporting to be a printed copy, cannot be received in evidence, without a notice to produce the manuscript (*h*); neither will a duplicate writing, taken from an autograph, at one impression by means of a copying machine, be regarded as an original, but the autograph itself must be produced, or its non-production be accounted for as in ordinary cases (*i*). Still, all printed copies struck off in one common impression, though they constitute merely secondary evidence of the contents of the paper from which they are taken, are considered as primary evidence of each other's contents; and, therefore, where the question was, whether a prisoner was acquainted with the contents of certain placards, some copies of which were traced to his possession, a copy remaining with the printer was allowed to be read in evidence for the prosecution, though no notice had been served upon the prisoner to produce the copies which had been delivered to him (*j*). Again, on an indictment for feloniously setting fire to a house, with intent to defraud the insurers, the policy itself, being the best evidence of the fact of insurance, must be produced by the prosecutor with the appropriate stamp; and recourse cannot be had to the books of the insurance office, even though the policy be in the defendant's possession, unless notice to produce it has been duly served upon him (*k*). The memorial of a registered conveyance is also inadmissible, as primary evidence, to prove the contents of the deed (*l*); and even as secondary evidence of such contents, it can only be received against the party by whom the deed is registered, and those who claim under him (*m*). Against such persons it certainly becomes evidence, being considered in the light of an admission (*n*). On one or two occasions, an examined copy of the registry has been received as secondary evidence of the contents of the deed as against third persons, but the question has not been much discussed, and

(*h*) *R. v. Watson*, 32 How. St. Tr. 82—86; 2 Stark. R. 129, S. C.

(*i*) *Nodin v. Murray*, 3 Camp. 238, per Lord Ellenborough.

(*j*) *R. v. Watson*, 32 How. St. Tr. 82—86; 2 Stark. R. 129, S. C.

(*k*) *R. v. Doran*, 1 Esp. 127, per Lord Kenyon; *R. v. Gilson*, R. & R. 138; *R. v. Ellicombe*, 5 C. & P. 522, per Littledale, J.; 1 M. & Rob. 260, S. C.

(*l*) *Molton v. Harris*, 2 Esp. 549, per Lord Kenyon.

(*m*) *Doe v. Clifford*, 2 C. & Kir. 448, 452, per Alderson, B.

(*n*) *Wollaston v. Hakewill*, 3 M. & Gr. 297; 3 Scott, N. R. 593, S. C.

the correctness of this practice admits of considerable doubt (*n*). The enrolment of a lease granted by the Crown is primary evidence, because the possessions of the Crown cannot be alienated but by matter of record; and the same rule applies to leases granted by the Duke of Cornwall, on account of the identity of interest which subsists between his Royal Highness and the Crown (*o*).

§ 308. It may occasionally be a question of some nicety to determine what instrument constitutes the primary evidence of a transaction. Thus, where goods have been sold through the medium of a broker, it is not yet distinctly decided how far the *broker's book* is admissible in proof of the contract. At one time it seems to have been held that this book, if duly signed by the broker, furnished the best evidence of the agreement (*p*), and though it has since been ruled, after much consideration, and after consulting merchants, that the *bought and sold notes*, provided they agree, and are signed so as to satisfy the Statute of Frauds, constitute the contract, and as such, must be produced in the first instance (*q*); yet, if there be no notes, recourse may still be had to the signed entry in the broker's book (*r*). Whether, in the event of a material disagreement between the bought and sold notes, the broker's book may be resorted to, is a more difficult question. On two occasions, Lord Denman appears to have considered that such a course could not be pursued (*s*); and Lord Abinger has expressed a similar opinion, though he has carefully confined his observations to a case where it cannot be shown that the broker's book was

(*n*) *Doe v. Kilner*, 2 C. & P. 289; *Collins v. Maule*, 8 C. & P. 502. See *Jenkins v. Biddulph*, Ry. & M. 239; and *Doe v. Clifford*, 2 C. & Kir. 448.

(*o*) *Rowe v. Brenton*, 8 B. & C. 755—758.

(*p*) *Heyman v. Neale*, 2 Camp. 337, per Lord Ellenborough; *Grant v. Fletcher*, 5 B. & C. 436; 8 D. & R. 59, S. C.; *Henderson v. Barnewall*, 1 Y. & J. 387.

(*q*) *Goom v. Afalo*, 6 B. & C. 117; 9 D. & R. 148, S. C.; *Thornton v. Kempster*, 5 Taunt. 786; *Thornton v. Meux*, M. & M. 43, per Abbott, C. J.; *Cumming v. Roebuck*, Holt's N. P. R. 172; *Hawes v. Forster*, 1 M. & Rob. 368, per Lord Denman; *Townend v. Drakeford*, 1 C. & Kir. 20, per id.

(*r*) *Townend v. Drakeford*, 1 C. & Kir. 20; *Pitts v. Beckett*, 13 M. & W. 746, per Parke, B.

(*s*) *Townend v. Drakeford*, 1 C. & Kir. 20; *Gregson v. Ruck*, 4 Q. B. 737, 747. In these cases the question did not directly arise, as, in the first, the entry in the broker's book was unsigned, and in the last, the book does not appear to have been tendered in evidence at all.

known to the parties (*t*). On the other hand, Mr. Baron Parke appears to entertain serious doubts upon the subject, and has urged that the broker would scarcely be bound by his oath and bond to enter the terms of the contracts negotiated by him in his books, and to sign those books, if the entries so made by him were not intended to have a binding effect (*u*). There is much force in this reasoning, though it is not of universal application to cases where brokers have been employed, since it is only stockbrokers and London brokers who are bound to keep books, the former being directed to do so by statute (*v*), the latter by the City regulations (*w*). Still, it is probable that the doctrine supported by Baron Parke will ultimately prevail; and the more so, as the argument rejecting the broker's book, on the ground that the parties are ignorant of its contents, appears to be entitled to little weight; for, first, there is no necessity that they should be ignorant, but either of the principals may, if he thinks fit, demand to see the entry of the contract; secondly, if the broker performs his duties in so negligent a manner as to subject either of the parties to loss, he is responsible to the amount of the injury sustained; and, lastly, if this argument were to prevail, it might equally be applied to almost every case where a contract is negotiated through the medium of an agent.

§ 309. Where a party wishes to enforce a contract made through a broker, it will be sufficient for him to produce the note in his possession, and to show that the broker has been employed in the transaction by his adversary; and this latter, if he seeks to rely on any variance between the bought and sold notes, must produce, as his evidence, the one that has been handed to himself (*x*). The amount of variance that will render the contract nugatory cannot be expressly defined. In one case, where the bought note spoke of a brokerage of one per cent., and a deposit of fifteen per cent.,

(*t*) *Thornton v. Charles*, 9 M. & W. 809.

(*u*) *Id.* 804, 807, 808. See further on this subject, *Bell on Sale*, 72, 73.

(*v*) 7 Geo. 2, c. 8, § 9, made perpetual by 10 Geo. 2, c. 8.

(*w*) Rules made by the court of Lord Mayor and Aldermen of the city of London on 16th Sept., 1818; cited by *Russ. on Factors*, pp. 344—348.

(*x*) *Hawes v. Forster*, 1 M. & Rob. 368, per Lord Denman.

and the sold note stated that the brokerage was ten shillings per cent., and omitted all mention of the deposit, Lord Denman ruled that the discrepancy was fatal, though, with respect to the brokerage, one of the jury interpreted the notes as meaning that the buyer should pay the broker one per cent., and the seller half per cent. (*y*). It seems, however, that a mere clerical error, or even a mistake in a name, if productive of no loss, would not invalidate the sale (*z*).

§ 310. It is now decided, after much discussion, that the title of a person as executor or administrator may be *primarily* proved, in any one of the following ways;—namely, by producing either the probate or letters of administration, or an exemplification or certificate thereof granted by the Ecclesiastical Court (*a*), or the book of acts in the Prerogative Office directing the grant of the probate (*b*) or letters (*c*), or an examined copy of such book (*d*), or if no act book or other record be kept, even minutes of the proving of the will and sealing of probate, endorsed on the original will by the surrogate and registrar or deputy registrar of the Diocesan Court (*e*).

§ 311. The rule, which determines under what head of evidence deeds executed in duplicate are to be classed, appears to be this: When two or more parts are sealed and delivered by each party, a practice which, of late years, has frequently prevailed, they are denominated *duplicate* or triplicate *originals* (*f*), and as such are considered to be primary evidence (*g*). When, however, each part is executed by one party only, as often occurs in the case of leases, the two instruments are called *counterparts*, and each is alternately

(*y*) *Townend v. Drakeford*, 1 C. & Kir. 20. See also *Thornton v. Kempster*, 1 Marsh. 355; 5 Taunt. 786, S. C.

(*z*) *Mitchell v. Lapage*, Holt, N. P. R. 253. See *Bold v. Rayner*, 1 M. & W. 343.

(*a*) *Kempton v. Cross*, Cas. Temp. Hardw. 108; B. N. P. 246; *Doe v. Gunning*, 7 A. & E. 244.

(*b*) *Cox v. Allingham*, Jac. 514, per Sir Thos. Plumer, M. R.

(*c*) *Elden v. Keddell*, 8 East, 187.

(*d*) *Davis v. Williams*, 18 East, 232.

(*e*) *Doe v. Mew*, and *Doe v. Gunning*, 7 A. & E. 240; 2 N. & P. 260, 266, note, S. C. (*f*) 2 M. & Gr. 518, (*b*).

(*g*) See *Colling v. Treweek*, 6 B. & C. 398, per Bayley, J.; *Brown v. Woodman*, 6 C. & P. 206, per Parke, J.

the best evidence as against the party sealing it, and those in privity with such party (*h*), and secondary evidence of the contents of the other part (*i*). Thus, if a landlord brings an action for rent, he produces the counterpart executed by the tenant as original evidence, or, in the event of its loss, he may have recourse, either to the part sealed by himself, or to any other species of secondary proof (*j*); but if the tenant is the person aggrieved, he must rely on the part delivered by the landlord, and that executed by himself will only be considered as secondary evidence. With respect to the stamp, the counterpart sealed by the lessor is usually deemed the original; but that which is sealed by the lessee, may be described in pleading as the "indenture," though stamped as a counterpart, provided the action be brought against the lessee (*k*). On one or two occasions where it was necessary to show that the plaintiff's ancestor had exercised acts of ownership over the property in question, counterparts of leases older than the period of living memory, and found in the ancestor's muniment room, have been admitted in evidence even against strangers, though they were executed by no one but the persons named as lessees, who were not shown to have actually held under them, and though no excuse was given for not producing the original leases sealed by the ancestor (*l*). It is difficult to reconcile these decisions with strict principle, since these counterparts amounted, in fact, to no more than admissions by third parties that the ancestor was seised; but the judges appear to have relaxed the rule, in consequence of the acknowledged difficulty of tracing acts of ownership after the lapse of many years; and looking at the question in this light, few persons will probably feel inclined to quarrel with the doctrine as now established.

(*h*) *Roe v. Davis*, 7 East, 363; *Mayor of Carlisle v. Blamire*, 8 East, 487; *Paul v. Meek*, 2 Y. & Jer. 116; *Pearce v. Morrice*, 3 B. & Ad. 396; *Burleigh v. Stibbs*, 5 T. R. 465.

(*i*) *Munn v. Godbold*, 3 Bing. 292; 11 B. Moore, 49, S.C. As secondary evidence it will be admissible, though unstamped, *id*.

(*j*) *Doe v. Ross*, 7 M. & W. 102; *Hall v. Ball*, 3 M. & Gr. 242; 3 Scott, N. R. 577, S. C.

(*k*) *Pearce v. Morrice*, 3 B. & Ad. 396.

(*l*) *Doe v. Pulman*, 3 Q. B. 622; *Duke of Bedford v. Lopes*, cited *id*. 623, as decided by Lord Denman; *Clarkson v. Woodhouse*, 5 T. R. 412, note (*a*); 3 Doug. 189, S. C. In this last case, the distinction between counterparts and leases does not appear to have been much discussed, if taken at all.

CHAPTER V.

OF SECONDARY EVIDENCE.

§ 312. In the last chapter we discussed the rule which requires the production of the best attainable evidence, and endeavoured, by examples, to illustrate the distinction between primary and secondary modes of proof. It remains to be seen upon what occasions *secondary evidence* will be received; and the first general rule on this subject is, that *such evidence is inadmissible, until it be shown that the production of primary evidence is out of the party's power*. It will be convenient to discuss this rule, and the exceptions to it, as they apply, first, to documentary evidence, and next, to oral testimony; and with respect to documents, it will be found that proof of their contents may be established by secondary evidence, first, where the original writing is destroyed or lost; secondly, where its production is physically impossible, or at least highly inconvenient; thirdly, where the document is in the possession of the adverse party, who refuses after notice, and in some cases without notice, to produce it; fourthly, where it is in the hands of a third party, who is not compellable by law to produce it, and he being called as a witness, with a subpoena duces tecum, relies upon his right to withhold it; fifthly, where there is a strong presumption of law in favour of the existence of the document; sixthly, where the papers are voluminous, and it is only necessary to prove their general results; and lastly, where the question arises on the examination of a witness on the voir dire.

§ 313. First, if the *instrument is destroyed or lost*, the party seeking to give secondary evidence of its contents must either prove its destruction positively, or at least presumptively, by showing that it has been thrown aside as useless (*a*), or must establish its loss, by proof that a search has been unsuccessfully made for

(*a*) *R. v. Johnson*, 7 East, 66; 29 How. St. Tr. 437—440, S. C.

it, in the place or places where it was most likely to be found. What *degree of diligence* is necessary in the *search* cannot easily be defined, as each case depends much on its peculiar circumstances (*b*); but the party is generally expected to show, that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him. It should be recollected, that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument; and that this is a preliminary inquiry addressed to the discretion of the judge (*c*). The party therefore, offering secondary evidence, need not, on ordinary occasions, have made a search for the original document, as for stolen goods, nor be in a position to negative every possibility of its having been kept back (*d*). If, indeed, the document be important, and such as the owner may have an interest in keeping, or if there be any reason to suspect that it has been fraudulently withheld, a very strict examination will properly be required; whereas, if the paper be supposed to be of little or no value, a very slight degree of diligence will be demanded, as it will be aided by the presumption of destruction or loss, which that circumstance affords (*e*).

§ 314. If the document belongs to the personal custody of a particular individual, or is proved, or may be presumed, to be in his possession, he must in general be served with a subpoena duces tecum, and be sworn to account for it; since, so long as he is capable of being called as a witness, his declarations respecting it will, in strictness, be inadmissible (*f*), and, even after his death, this species of evidence, though admissible as tending to prove the

(*b*) *Brewster v. Sewell*, 3 B. & A. 303, per Best, J.; *Gully v. Bp. of Exeter*, 4 Bing. 298. See *Pardoe v. Price*, 13 M. & W. 267. (c) *Ante*, § 21.

(*d*) *McGahey v. Alston*, 2 M. & W. 214, per Alderson, B.; recognised per Wigram, V. C., in *Hart v. Hart*, 1 Hare, 9.

(*e*) *Gathercole v. Miall*, 15 M. & W. 319, 322, 329, 330, per Pollock, C. B.; 335, 336, per Alderson, B.; *Brewster v. Sewell*, 3 B. & A. 299, 300, 303; *Kensington v. Inglis*, 8 East, 278; *R. v. East Fairley*, 6 D. & R. 153, per Bayley, J.; *Freeman v. Arkell*, 2 B. & C. 494; 3 D. & R. 669, S. C.

(*f*) *R. v. Denio*, 7 B. & C. 620; *R. v. Castleton*, 6 T. R. 236; *Williams v. Younghusband*, 1 Stark. R. 139; *Walker v. Countess of Beauchamp*, 6 C. & P. 552, per Alderson, B.

diligence and extent of the search, must be received with great caution (*g*). Still, on one occasion, where inquiries had been made of an apprentice shortly before his death, respecting his indenture, when he stated that it had been given up to him after the expiration of the apprenticeship, and that he had burnt it, secondary evidence of its contents was received, though no search had been made, it appearing that there was no duplicate, that the master was dead, and that his executrix had declared that she knew nothing about it (*h*). The decision in that case appears to have proceeded on the somewhat dubious ground, that, if the statement of the apprentice was inadmissible, the indenture was not traced into his hands, and being *functus officio*, there was no particular reason why it should be in his custody, while, if the statement could be received so as to show a possession of the deed by him, it showed also that further search or inquiry was unnecessary (*i*). The second branch of this dilemma is unanswerable, but the first is subject to much doubt; for even if the fact of the deed not being traced into the hands of the apprentice, could preclude the necessity of searching in that quarter (*j*), it could not discharge the parties of laches, in having neither called the personal representative of the master, nor even examined his papers. Perhaps, however, this decision may best be supported, by considering that the evidence was there admitted for the mere purpose of satisfying the conscience of the judge on a preliminary inquiry; and that, consequently, a somewhat looser rule was allowed to prevail than would have been applicable to the proof of the material facts of the case (*k*). Indeed, this distinction between evidence addressed to the judge and that submitted to the jury, has been recently adopted by the Court of Queen's Bench, who have almost gone the length of holding, that, in order to show that an honest

(*g*) *R. v. Rawden*, 2 A. & E. 158, per Lord Denman.

(*h*) *R. v. Morton*, 4 M. & Sel. 48.

(*i*) Per Lord Ellenborough, in 4 M. & Sel. 50; explained by Bayley, J., in *R. v. Denio*, 7 B. & C. 622. In *City of Bristol v. Wait*, 6 C. & P. 591, Alderson, B., held, that in order to let in secondary evidence of the appointment of one of the defendants as overseer, it was sufficient to show that a witness had asked him for his appointment, when he stated that he had lost it, whereupon no search was made.

(*j*) See post, § 316, n. (*p*).

(*k*) *R. v. Kenilworth*, 2 Sess. Cas. 72, per Coleridge, J.; 7 Q. B. 652, S.C.

and diligent search has been made for a document, so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it might be received (*k*).

§ 315. If the instrument ought to have been deposited in a public office, or other particular place, it will, in general, be deemed sufficient to have searched that place, without calling the party, whose duty it was to have put it there, or any other person who may have had access to it. Thus, where it appeared that a parish indenture of apprenticeship had been given to a person since dead to take to the overseers, and a fruitless search was made for it in the parish chest, which was the proper repository for such instruments, secondary evidence was admitted, though none of the overseers were called, and no inquiry was made of the personal representative of the party, who ought to have delivered it to the parish officers (*l*). So, where it was the duty of a paying clerk of a parish to deposit a certain cancelled cheque in a room of the workhouse, an application to the successor of this clerk for an inspection of the cheques in the room, and an ineffectual examination of several bundles, which were handed to the party searching by the successor, was deemed a sufficient search to let in secondary evidence, though no notice to produce had been served on the first clerk, he being the defendant in the cause, and though the person who succeeded him in the office was not called (*m*). Again, secondary evidence of the contents of a warrant, issued by the defendant, has been received, on proof by the high constable, who levied under it, that he had deposited it in his office, and had sought for it there in vain, though he added that the town-clerk had access to the office, and it was objected that the defendant should have been served with a notice to produce the warrant, and the town-clerk with a subpoena duces tecum (*n*).

§ 316. It may often be difficult to ascertain what is the *proper custody* of an instrument, and on these occasions it will always be

(*k*) *R. v. Kenilworth*, 2 Sess. Cas. 66; 7 Q. B. 642, S.C.

(*l*) *R. v. Stourbridge*, 8 B. & C. 96; 2 M. & R. 43, S.C. See *Minshall v. Lloyd*, 2 M. & W. 450. (*m*) *M'Gahey v. Alston*, 2 M. & W. 206, 212.

(*n*) *Fernley v. Worthington*, 1 M. & Gr. 491.

expedient, and sometimes necessary, to search several places. Thus, where a marriage settlement, after providing a portion for younger children, and vesting a legal term in trustees to secure it, reserved an ultimate remainder to the settlor's heir, it was held that a search among the papers of the surviving younger child was insufficient to let in secondary evidence of its contents, and that the papers of the surviving trustee, and of the heir, should also have been examined (*o*). Again, an expired indenture of apprenticeship sometimes remains with the master, sometimes with the apprentice; but as the latter appears to have the greater interest in its preservation (*p*), stricter inquiry should be made of him than of the master, though, in the absence of positive proof respecting the possession, search should be instituted among the papers of both. So, the lessor and lessee appear to be equally entitled to the custody of an expired lease; for, whether the term came to an end by efflux of time or by forfeiture, the lessee, for a time at least, would have a right to keep the deed, since he might have occasion to use it in an action of covenant against the lessor; but, after a considerable interval, it would frequently be found in the landlord's possession, as constituting one of the muniments of his title (*q*). Under these circumstances, prudence dictates an application to both parties, whenever it may be necessary to prove the loss of such an instrument, though it has never been expressly decided, that a search among the muniments of the lessor alone would not let in secondary evidence; and Mr. Justice Bayley, on one occasion, appears to have thought that an examination of the lessee's papers would not be absolutely necessary (*r*).

§ 317. The legal custody of a document appointing an overseer is in that officer, he being the person most interested in it, and requiring its production as a sanction for those acts, which he may be called upon to do under its authority. In the absence, therefore,

(*o*) *Cruise v. Clancy*, 6 Ir. Eq. R. 552, 556, per Sir Ed. Sugden, Ch.

(*p*) See *Hall v. Ball*, 3 M. & Gr. 247.

(*q*) *Hall v. Ball*, 3 M. & Gr. 242, 253; 3 Scott, N. R. 577, S.C.; *Plaxton v. Dare*, 10 B. & C. 17; 5 M. & R. 1, S.C.; *R. v. North Bedburn*, Cald. Cas. 452, per Buller, J.

(*r*) *Brewster v. Sewell*, 3 B. & A. 301, 302; *Hall v. Ball*, 3 M. & Gr. 247, per Erskine, J.

of proof that the parish officers have the actual custody of such an instrument, it will not suffice to give them notice to produce it, but before secondary evidence can be received, it will be necessary to call the overseer himself (*s*). In a late case before Vice-Chancellor Wigram, it appeared that a solicitor, who had prepared an agreement between the plaintiff and defendant, had sent it, after execution, to the defendant by his clerk. This clerk was not called, having quitted the service of the solicitor a long time back; but the defendant's clerk stated that he had searched for the deed in his counting-house, where the transactions to which it referred were all carried on, and where books containing entries relating to these transactions were kept. His Honour, on this state of facts, expressed no opinion as to the effect of the absence of the solicitor's clerk, but referred the case back to the Master, in order that a further search might be made at the defendant's private residence, since it did not appear that his clerk, who had been actively concerned in the transactions in question, had ever seen the deed at the counting-house (*t*).

§ 318. If the party entitled to the custody of a document is *dead*, inquiries should, in general, be made of his personal representatives, and if the document relate to the real estate, of the heir-at-law also; but this is not necessary, if it appear that another party is in possession of his papers. Where, therefore, the master of an apprentice, being possessed of the indenture, failed, and an attorney took the management of his affairs, and the custody of his papers, it was held that, after the master's death, an inspection of these papers by the attorney would let in secondary evidence of the deed of apprenticeship, though no inquiries had been made of the master's widow (*u*).

§ 319. It is not necessary that the search should have been *recent*, or made for the *purposes of the cause*; and therefore,

(*s*) *R. v. Stoke Golding*, 1 B. & A. 173, 176.

(*t*) *Hart v. Hart*, 1 Hare, 1. In *Bligh v. Wellesley*, 2 C. & P. 400, a witness stated that he had in vain searched for some papers in a box, in which he thought he had put them, but that he still fancied they were somewhere in his possession, though he had not looked elsewhere for them. Held insufficient, per Best, C. J.

(*u*) *R. v. Piddlehinton*, 3 B. & Ad. 460.

where it was made amongst the proper papers three years before the trial, it was held sufficient, though it certainly would have been more satisfactory, had the papers been again examined (*v*). If the instrument was executed in duplicate, or triplicate &c., the loss of all the parts must be proved, in order to let in secondary evidence of the contents (*w*); and, in all cases, before such evidence will be admissible, it must be shown that the original instrument was duly executed, and was otherwise genuine (*x*). If there were an attesting witness, he must, if known, be called, or in the event of his death, his handwriting must be proved, precisely in the same manner as if the deed itself had been produced; though, if it cannot be discovered who the attesting witness was, this strictness of proof will, from the necessity of the case, be waived. In the absence of evidence to the contrary, the Court will presume that the instrument was duly stamped (*y*).

§ 320. Notwithstanding the rule, which, in general, enables parties to prove, by secondary evidence, the contents of documents lost or destroyed, there are some occasions, on which it is necessary to produce the written instruments themselves. Thus, no action at law will lie on a *lost bill of exchange*, promissory-note, or cheque, or on the respective considerations, provided the instrument was originally drawn payable to bearer, or has become so payable, in consequence of having been indorsed in blanc (*z*); but, in the case of loss, the payee must tender sufficient indemnity to the acceptor or maker, and if this be refused, he may enforce payment thereupon in a court of equity (*a*). As between the indorsee

(*v*) *Fitz v. Rabbits*, 2 M. & Rob. 60.

(*w*) *R. v. Castleton*, 6 T. R. 236; B. N. P. 254; *Alivon v. Furnival*, 1 C. M. & R. 292. See ante, § 288.

(*x*) *Goodier v. Lake*, 1 Atk. 446; *R. v. Culpepper*, Skin. 673; *Doe v. Whitefoot*, 8 C. & P. 270; *Jackson v. Frier*, 16 Johns. 196; *Kimball v. Morrell*, 4 Greenl. 368.

(*y*) *Hart v. Hart*, 1 Hare, 1; *Pooley v. Goodwin*, 4 A. & E. 94; *R. v. Long Buckby*, 7 East, 45; *Crisp v. Anderson*, 1 Stark. R. 35.

(*z*) *Hansard v. Robinson*, 7 B. & C. 90; 9 D. & R. 860, S.C.; *Pierson v. Hutchinson*, 2 Camp. 211, per Lord Ellenborough; 6 Esp. 126, S.C.; *Mayor v. Johnson*, 3 Camp. 324; *Davis v. Dodd*, 4 Taunt. 602; *Champion v. Terry*, 3 B. & B. 295; 7 Moore, 130, S.C.; *Bevan v. Hill*, 2 Camp. 381, per Lord Ellenborough; *Woodford v. Whiteley*, M. & M. 517, per Parke, B. See *Alexander v. Strong*, 9 M. & W. 733; *Lubbock v. Tribe*, 3 M. & W. 607.

(*a*) 9 & 10 Will. 3, c. 17, § 3; 3 & 4 Anne, c. 9; *Rolt v. Watson*, 4 Bing. 274;

and acceptor of a bill, this rule rests upon the twofold ground, that the acceptor, on payment of the instrument, has a right to its possession, first for his own security, and, secondly, as his voucher and discharge pro tanto in his account with the drawer; and although, if the action be brought by the drawer of a bill against the acceptor, or by any of the parties to a note against the maker, the second reason cannot apply, still the necessity of securing the acceptor or maker against the demands of a subsequent bonâ fide holder remains the same.

§ 321. If this rule furnishes a fair and reasonable protection to parties primarily liable on negotiable securities, it is still more necessary to enforce it, where the loser seeks to recover against the drawer or indorsers, who are only called upon to pay the bill in default of payment by the acceptor; and who, if the loser could recover from them, might be put to infinite embarrassment in making out their own title against the acceptor, or against other parties liable to them, without the production of the bill (*b*). It appears to be immaterial, in the application of this rule, whether the bill, note, or cheque, was lost before or after it became due, or after actual demand of payment, and an express promise to pay, or even after action brought; but, in all cases, where the defendant might be compelled, if the instrument were found, to pay it again to a bonâ fide holder, the plaintiff will be nonsuited if the loss occurs before the actual trial (*c*). If, indeed, he can show that, at the time when the instrument was lost, it was not in a negotiable state, as if it were originally made payable to himself alone,—or if, being transferable by indorsement, it were lost by the drawer before it had been indorsed, or by the payee, to whom it had been specially indorsed, before it was indorsed by him,—the action at law will be sustainable either on the instrument itself or on the consideration;

Hansard v. Robinson, 7 B. & C. 95. As to the mode of proceeding to enforce payment of a lost bill in equity, see *Warmley v. Child*, 1 Ves. sen. 341; *Toulmin v. Price*, 5 Ves. 238; *Ex parte Greenway*, 6 Ves. 812; *Macartney v. Graham*, 2 Sim. 285; *Davies v. Dodd*, 1 Wils. Ex. 110; *Mossop v. Eadon*, 16 Ves. 430.

(*b*) Story on Bills, § 449.

(*c*) *Hansard v. Robinson*, 7 B. & C. 90; 9 D. & R. 860, S.C.; *Poole v. Smith*, Holt's N. P. R. 144, per Gibbs, C. J.; *Davis v. Dodd*, 4 Taunt. 602. These cases overrule *Glover v. Thomson*, Ry. & M. 403.

because, in such cases, the defendant cannot be rendered liable to pay the amount a second time (*d*).

§ 322. Whether an action at law will lie on a *destroyed bill*, is a question that admits of some doubt. On one or two occasions the affirmative of the proposition seems to have been assumed (*e*); but, in another case, where the necessity of producing the bill was much discussed, the Court appear to have thought, that, at least as between indorsee and acceptor, the destruction of the instrument would be as fatal to the action at law as its loss, since, in either event, the acceptor would have no voucher or discharge towards the drawer; and even with respect to the general question, it was asked, how could the party liable on the bill be assured of the fact that it was destroyed? Was he to rely on the assertion of the payee, or to defend an action at the peril of costs? (*f*)

§ 323. Secondly, the contents of writings may be proved by *secondary evidence*, where their production is either *physically impossible*, or *highly inconvenient*. Thus, *inscriptions on walls* and *fixed tables*, *mural monuments*, *gravestones*, *surveyors' marks* on boundary trees, notices warning trespassers affixed on boards, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in Court (*g*). A remarkable illustration of this rule was furnished in the case of a man, who was convicted of writing a libel on the wall of the Liverpool gaol, on mere proof of his handwriting (*h*). But in order to let in secondary evidence, it must clearly appear that the document or writing was affixed to the freehold, and could not easily be removed; therefore, where a notice was merely suspended to the wall of an office by a nail, it was considered necessary to produce it at the trial (*i*). If a

(*d*) *Rolt v. Watson*, 4 Bing. 273; 12 Moore, 510, S.C.; *Wain v. Bailey*, 10 A. & E. 616; *Long v. Bailie*, 2 Camp. 214, n., per Lord Ellenborough.

(*e*) *Pierson v. Hutchinson*, 2 Camp. 212, per Lord Ellenborough; *Woodford v. Whiteley*, M. & M. 517, per Parke, B.

(*f*) *Hansard v. Robinson*, 7 B. & C. 95. See Story on Bills, § 448, n. 1.

(*g*) *Mortimer v. McCallan*, 6 M. & W. 68, per Lord Abinger, and 72, per Alderson, B.; *R. v. Fursey*, 6 C. & P. 84, 85; *Doe v. Cole*, id. 360, per Patteson, J.; *Bartholomew v. Stephens*, 8 C. & P. 728, per id.

(*h*) Mentioned by Lord Abinger, 6 M. & W. 68.

(*i*) *Jones v. Tarleton*, 9 M. & W. 675; 1 Dowl. N. S. 625, S.C.

During a case 1816, where held, that drawer could not recover, as it appeared in note payable to his order, which he had lost more before indorsement. This is assumed in Rolt v. Watson, and modified the law as stated in the text.

document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted, because here, as in the case of mural inscriptions, it is not in the power of the party to produce the original (*j*).

§ 324. On a similar ground, the existence and contents of any record of a judicial court, and of entries in any other *public books or registers*, may be proved by an examined copy, and in some cases, by an office copy, or even by a mere certificate (*k*). This rule extends to all records and entries of a public nature, in books required by law to be kept; and is adopted, because of the inconvenience to the public which the removal of such documents might occasion, especially if they were wanted in two or more places about the same time; and also, because of the public character of the facts they contain, and the consequent facility of detection of any fraud or error in the copy (*l*).

§ 325. Thirdly, where the document is in the *possession of the adversary, who withholds it at the trial*, secondary evidence of its contents will be admitted, *provided that a notice to produce the original* has been duly served, where such notice is requisite (*m*). In the application of this rule, no distinction is recognised between civil and criminal cases; but in either mode of proceeding, in order to render the notice available, it must be first shown that the instrument is in the hands, or under the control, of the party required to produce it (*n*). Of this fact very slight evidence will raise a sufficient presumption, where the document exclusively belongs to him, or regularly ought to be in his custody, according to the course of business; and, therefore, where a bankruptcy certificate was proved to have been obtained for the defendant, the Court presumed that it had come into his possession (*o*). So, if

(*j*) *Alivon v. Furnival*, 1 C. M. & R. 277, 291, 292.

(*k*) This subject will be discussed at length in the Chapter *On Public Documents*.

(*l*) B. N. P. 226.

(*m*) *R. v. Watson*, 2 T. R. 201, per Buller, J.; *Att.-Gen. v. Le Marchant*, id. n.; *Cates v. Winter*, 3 T. R. 306.

(*n*) *Sharpe v. Lamb*, 11 A. & E. 805; 3 P. & D. 454, S.C.

(*o*) *Henry v. Leigh*, 3 Camp. 502, per Lord Ellenborough. See also *Robb v. Starkey*, 2 C. & Kir. 143.

papers were last seen in the hands of the defendant, it lies upon him to trace them out of his possession (*p*), and for this purpose, he may interpose with evidence while the plaintiff's case is proceeding; and, as such evidence is submitted to the judge alone, its admission does not give the plaintiff's counsel a right to reply to the jury (*q*). It would seem that, where a party has notice to produce a particular instrument traced to his possession, he cannot object to parol evidence of its contents, on the ground that, previous to the notice, he had ceased to have any control over it, unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it (*r*); neither can he escape the effect of the notice, by afterwards voluntarily parting with the instrument, which it directs him to produce (*s*).

§ 326. If the instrument is in the possession of another, in *privity* with the party, such as his banker (*t*), agent, servant, deputy, or the like, such person need not be served with a subpoena duces tecum, or even be called as a witness, but a notice given to the party himself will suffice (*u*). Thus, a notice to a shipowner to produce papers, though the captain has possession of them for his own protection (*v*),—or a notice to a sheriff to produce a warrant, which is shown to have been returned to the undersheriff, during the time that the sheriff remained in office (*w*),—will warrant the admission of secondary evidence. Where a document deposited in a court of equity by a party to a suit, and scheduled in his answer, had been ordered to be delivered to him, it was held to be sufficiently within his control, to let in secondary evidence after notice

(*p*) *R. v. Thistlewood*, 33 How. St. Tr. 757, 758; *R. v. Ings*, id. 989.

(*q*) *Harvey v. Mitchell*, 2 M. & Rob. 366, per Parke, B.; *Smith v. Sleaf*, 1 C. & Kir. 48, per Alderson, B.

(*r*) *Sinclair v. Stevenson*, 1 C. & P. 585, 586, per Best, C. J. In *Knight v. Martin*, Gow, R. 103, where secondary evidence was held inadmissible, the party served with a notice to produce a lease, told his opponent that he had assigned it.

(*s*) Per Dallas, C. J., in *Knight v. Martin*, Gow, R. 104.

(*t*) *Partridge v. Coates*, Ry. & M. 156, per Abbott, C. J.; *Burton v. Payne*, 2 C. & P. 520, per Bayley, J.

(*u*) *Sinclair v. Stephenson*, 1 C. & P. 584, per Best, C. J.

(*v*) *Baldney v. Ritchie*, 1 Stark. R. 338, per Lord Ellenborough.

(*w*) *Taplin v. Atty*, 3 Bing. 164.

to produce, though it appeared that, at the time of the trial, the document was still in the hands of an officer of that court (*x*). But, though, in order to render the notice available, the party need not have actual possession of the instrument, he must have such a right to it, as would entitle him, not merely to inspect, but to retain it; and, therefore, where it was held by a stakeholder between the defendant and a stranger to the cause (*y*), or where it was delivered to a third person, under whom the defendant justified in an action of trespass, and by whose directions he acted (*z*), parol evidence of its contents was rejected, notwithstanding a notice to produce had been duly served on the defendant.

§ 327. The notice may be given either *verbally*, or in *writing* (*a*); and if in the latter form, may be directed to the party or to his attorney, and may be served on either (*b*); indeed, it will be sufficient to leave the notice with a servant of the party at his dwelling-house (*c*), or with a clerk at the attorney's office; and where the attorney has been changed, a notice served on the first attorney before the change will suffice; for otherwise the effect of the notice might be easily evaded, by changing the attorney on the eve of the trial (*d*). A notice duly served on the party will not be rendered invalid by a subsequent bad service on the attorney (*e*).

§ 328. It may be difficult to lay down any general rule as to *what the notice ought to contain*, since much must depend on the particular circumstances of each case; but thus much is clear, that it is not necessary, by condescending minutely to dates, contents, parties, &c., to specify the precise documents intended. Indeed, it may be dangerous to do so, since if any material errors were to creep into the particulars, the party sought to be affected by the

(*x*) *Rush v. Peacock*, 2 M. & Rob. 162, per Lord Denman.

(*y*) *Parry v. May*, 1 M. & Rob. 279, per Little Dale, J.

(*z*) *Evans v. Sweet*, Ry. & M. 83, per Best, C. J.

(*a*) *Smith v. Young*, 1 Camp. 440, per Lord Ellenborough.

(*b*) *Hughes v. Budd*, 8 Dowl. 315; *Houseman v. Roberts*, 5 C. & P. 394; *Cates v. Winter*, 3 T. R. 306. This last case was a *qui tam* action.

(*c*) *Evans v. Sweet*, Ry. & M. 84, per Best, C. J.

(*d*) *Doe v. Martin*, 1 M. & Rob. 242, per Tindal, C. J.

(*e*) *Hughes v. Budd*, 8 Dowl. 315, per Patteson, J.

notice, might urge, with possible success, that he had been misled thereby. If enough is stated on the notice to induce the party to believe that a particular instrument will be called for, this will be sufficient (c). Thus, a notice to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action" (d), or "all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf; and also all books, papers, &c., relating to the subject-matter of this cause" (e), has been held sufficient to let in parol evidence of a particular letter not otherwise specified. In these cases the names of the parties by and to whom the letters were addressed appeared on the notice; and perhaps this circumstance sufficiently distinguishes them from an older decision (f), where a notice to produce "all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered" (g), was held too vague to admit secondary proof of a notice of dishonour sent by plaintiff to defendant. The authority, however, of this last case has been considerably shaken, if not entirely overruled, by a late decision, recognised by the Court of Queen's Bench, where, in an action for work and labour, a notice to produce "all accounts relating to the matters in question in this cause," was held to point out, with sufficient precision, a particular account relating to a small part of the work, though it appeared that many such accounts for different parts of the work had been rendered by the plaintiff to the defendant (h). The case of *Jones v. Edwards* (i) is not affected by this decision. That was an action against four defendants, as owners of a sloop, to recover an account for warehousing the rigging of the vessel. In order to prove that one of the defendants was a joint-owner, the plaintiff called for a letter, which was stated to have been written

(c) See *Rogers v. Custance*, 2 M. & Rob. 181.

(d) *Jacob v. Lee*, 2 M. & Rob. 33, per Patteson, J.

(e) *Morris v. Hauser*, 2 M. & Rob. 392, per Lord Denman; C. & Marsh. 29, S.C., nom. *Morris v. Hannen*.

(f) This distinction was pointed out and relied upon by Patteson, J., in *Jacob v. Lee*, 2 M. & Rob. 33.

(g) *France v. Lucy*, Ry. & M. 341, per Best, C. J.

(h) *Rogers v. Custance*, 2 M. & Rob. 179.

(i) M'Cl. & Y. 139.

nine years before by this defendant to the son of another defendant, and relied upon a "notice to produce letters and copies of letters, and all books relating to the cause." The Court decided that the notice was too uncertain, and no sensible man could entertain a different opinion. In one case, where the notice misdescribed the title of the cause, it was held to be invalid (*j*); but as the strict application of this rule, in cases where it is evident that the party served has not been misled, might be productive of serious injustice, it is hoped that, at the present day, it would not be allowed to prevail, unless the misdescription were of a flagrant nature. Indeed, the Court of Exchequer have very recently thrown out an intimation to this effect; for where a notice was objected to on the ground that it was entitled (by mistake) in a wrong court, Mr. Baron Alderson discountenanced the objection, saying, "One does not know where we are to stop. Would the notice be bad if one of the names was spelt wrong? . . . At the time of the decision in *Harvey v. Morgan*, the Courts were much more strict than now as to matters of this nature" (*k*).

§ 329. As to the *time* and *place* of the *service*, no precise rule can be laid down, except that it must be such as to enable the party, under the known circumstances of the case, to comply with the call. If the person to be served, whether client or attorney, dwells in another town than that in which the trial is had, he must, in general, be served before the commission day (*l*), and if the service is postponed till he has left home to attend the court, it will be insufficient (*m*). In town causes, however, and in country causes, where the attorney lives in the assize town, a shorter notice will be required, and provided the documents be such as may reasonably be presumed to be in the attorney's possession, a service on him, or at his office, early in the evening of the day preceding the

(*j*) *Harvey v. Morgan*, 2 Stark. R. 17. The notice, in that case, was entitled, "A. & B., assignees of C. & D., v. E.," instead of "A. & B., assignees of C., v. E."

(*k*) *Lawrence v. Clark*, 14 M. & W. 251.

(*l*) *Trist v. Johnson*, 1 M. & Rob. 259, per Park, J.; *R. v. Ellicombe*, id. 260, per Littledale, J.; *Lessee of Leader v. Duggan*, Ir. Cir. R. 124; *Humphrey v. St. Leger*, id. 714; *McMaster & Boyle's case*, id. 768.

(*m*) *George v. Thompson*, 4 Dowl. 656; *Hargest v. Fothergill*, 5 C. & P. 303, per Taunton, J.

trial, will in general be sufficient (*n*); though, if they would probably be in the client's custody, as, for instance, if they were a tradesman's books (*o*), or if they were letters, or papers, not obviously connected with the cause, such a service would be too late, since the attorney should have sufficient time to communicate with his client for the purpose of procuring the documents required (*p*). If a party is served with notice sufficiently early to enable him to produce the document, it makes no difference, that at the time of the service the cause is part heard (*q*). If the party served can prove that his papers are in a foreign country, or at such a distance from the place of trial, as to render it impossible for him to produce them under an ordinary notice, such a notice will be inoperative; but the Courts are, very properly, inclined to favour the sufficiency of the notice, whenever the circumstances of the case will warrant them in so doing. Thus, where the party had gone abroad, leaving the cause in the hands of his attorney, it was presumed that he had left with him all papers material to the cause, and, consequently, a notice served on the attorney the evening next but one before the trial, was held to be sufficient (*r*). So, a four days' notice, given to the defendant to produce letters written by him to his partner in New South Wales, was considered good, where long litigation on the subject of them made it presumable that they had been remitted to this country (*s*). It has even been held,

(*n*) *Atkins v. Meredith*, 4 Dowl. 658; *Leaf v. Butt, C. & Marsh*. 451, per Alderson, B.; *Meyrick v. Woods*, id. 452, per id.; *Firkin v. Edwards*, 9 C. & P. 478, per Williams, J.; *Gibbons v. Powell*, id. 634, per Gurney, B. In *Holt v. Miers*, id. 195, the service was held by Lord Abinger to be insufficient, the notice being left at the attorney's office, a few minutes before nine on the evening preceding the trial, and the attorney having, at that time, gone home. So, in an action on a bill of exchange, where notice to produce the bill was put into the letter-box of the office of the plaintiff's attorney, in London, at half-past eight on the evening before the cause was tried at the Middlesex sittings, it was held to be too late, though the plaintiff also lived in London. *Lawrence v. Clark*, 14 M. & W. 260. If the trial is to take place on the Monday, a service on the Sunday will not do; and perhaps a service on a Sunday would, in any event, be considered irregular and bad. See *Hughes v. Budd*, 8 Dowl. 317, per Patteson, J.

(*o*) *Atkins v. Meredith*, 4 Dowl. 658.

(*p*) *Byrne v. Harvey*, 2 M. & Rob. 89, per Lord Denman; *Vice v. Lady Anson*, M. & M. 97, per Lord Tenterden; *Affalo v. Fourdrinier*, id. 335, n., per Tindal, C. J.

(*q*) *Sturm v. Jeffree*, 2 C. & Kir. 442, per Pollock, C. B.

(*r*) *Bryan v. Wagstaff*, Ry. & M. 327, per Abbott, C. J.; 2 C. & P. 125, S. C.

(*s*) *Sturge v. Buchanan*, 10 A. & E. 598.

that a similar notice to a foreign defendant was sufficient, though the letters required had been addressed to him eighteen years before at his residence abroad. In that case, the action had commenced seven months before the trial; and though it was objected that the defendant had no time to procure the original papers to be transmitted from the country, where it was to be presumed they had been left, Chief Justice Abbott admitted secondary evidence of their contents, observing that it would lead to great inconvenience and delay, if trials were allowed to be postponed upon such an objection (*t*).

§ 330. The party seeking the production of papers must not put his adversary to needless trouble and expense. Thus, where a defendant's attorney, having been served in Essex with notice to produce certain deeds, fetched them from London, and on the commission day was served with a fresh notice to produce another deed, upon which he stated that the document was in town, where he had already been once, but that it should be forthcoming at the trial if the plaintiff would pay the expenses of a messenger, which offer was declined, the Court held that the defendant was justified in not complying with the notice, and that secondary evidence was inadmissible (*u*). If a party, on being served with a notice to produce a document, states that it is not in existence, parol proof of its contents will be received, and no objection can be taken to the lateness of the service (*v*).

§ 331. There are *six cases* in which a notice to produce is *not necessary*. The *first* is, where the instrument in the possession of the adversary, and that tendered in proof, are either *duplicate originals* (*w*), or are *counterparts*, and the part offered in evidence has been executed by the adversary, or by some person through whom he claims. In these cases no notice is necessary, because, as we

(*t*) *Drabble v. Donner*, Ry. & M. 47.

(*u*) *Doe v. Spitty*, 3 B. & Ad. 182. In this case, the second notice, having been served on the commission day, would perhaps have been held too late, independent of the special circumstances.

(*v*) *Foster v. Pointer*, 9 C. & P. 720, per Gurney, B.

(*w*) *Colling v. Treweek*, 6 B. & C. 398, per Bayley, J.; *Philipson v. Chase*, 2 Camp. 111, per Lord Ellenborough.

have seen, the instruments produced are considered not as secondary, but as primary evidence (*x*).

§ 332. *Secondly*, a notice to produce is not required, where the instrument to be proved is itself a *notice*. This exception to the general rule appears to have been originally adopted in regard to notices to produce, for the obvious reason, that, if a notice to produce such papers were necessary, the series of notices would become infinite (*y*). The judges, however, have subsequently extended the exception to many other notices, partly, perhaps, from a misapprehension of the ground on which the doctrine rests (*z*); partly, from the experienced inconvenience attendant on a strict observance of the rule requiring notice (*a*); partly, because the secondary evidence that is usually offered of notices is a copy of the paper sent, which partakes in great measure of the character of a duplicate original (*b*); and, chiefly, because it constantly happens that the opposite party is well aware, from the nature of the suit, that he will be charged with the possession of the original document (*c*). On one or other of these grounds, it has been held that, in order to let in proof by a copy, if not any species of secondary evidence, no notice is required to produce a notice to quit (*d*); a notice of dishonour (*e*), provided the action be brought

(*x*) Ante, § 311, and cases there cited.

(*y*) 3 St. Ev. 730; *Philpison v. Chase*, 2 Camp. 111.

(*z*) In *Philpison v. Chase*, 2 Camp. 111, Lord Ellenborough observes, "I approve of the practice as to notices to quit; and I remember when the point was first ruled by Mr. Justice Wilson, who said, that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required in infinitum." The fallacy of this reasoning is ably exposed by Mr. Starkie, in 3 St. Ev. 730.

(*a*) 2 Ph. Ev. 226, n. 5.

(*b*) *Kine v. Beaumont*, 3 B. & B. 291.

(*c*) *Colling v. Treweek*, 6 B. & C. 399, 400, per Bayley, J.; *Robinson v. Brown*, 16 Law J. (N. S.) C. B. 49, per Maule, J. See post, § 333.

(*d*) *Doe v. Somerton*, 7 Q. B. 58; *Jory v. Orchard*, 2 B. & P. 41, per Lord Eldon; *Colling v. Treweek*, 6 B. & C. 398, per Bayley, J. See *R. v. Mortlock*, 7 Q. B. 459.

(*e*) *Swain v. Lewis*, 2 C. M. & R. 261; 5 Tyr. 998, S.C.; *Kine v. Beaumont*, 3 B. & B. 288; 7 Moore, 112, S.C.; *Ackland v. Pearce*, 2 Camp. 601, per Le Blanc, J.; *Roberts v. Bradshaw*, 1 Stark. R. 28; *Colling v. Treweek*, 6 B. & C. 398, per Bayley, J. These cases, the first two of which were decided after conferring with the judges of the other courts, put the question beyond all dispute, and overrule the earlier decisions of *Langdon v. Hulls*, 5 Esp. 156, and *Shaw v. Markham*, Pea. R. 165.

upon the bill, but not otherwise (*f*) ; notices of action, or written demands, which are necessary to entitle the plaintiff to recover (*g*) ; and attornies' bills, delivered pursuant to statute (*h*). On one occasion, where an action was brought against a surety, on a bond conditioned to pay to the plaintiff, within six months after notice, the sum that should become due from the principal, a notice to produce this notice was held necessary by Lord Ellenborough, on the ground that it was not a mere notice, but in the nature of a statement of account between the plaintiff and the principal (*i*). Whether this case would now be considered a binding authority may be well questioned, since, in principle, it is difficult to distinguish it from several of the cases cited above, in which the notice to produce has been deemed unnecessary. But, be this as it may, the judges have determined, in a case where two parties had become sureties, by a joint and several bond, for the payment, within one month after notice should have been given to them, of such sum as should be due from their principal, that the service of notice upon one of the parties could not be proved in an action brought against the other, by producing the duplicate of the notice, but the first party should have been subpoenaed to produce the original, or to account for its non-production (*j*). Indeed, the exception would seem to be always inapplicable to cases in which the notice has been served on a third person (*k*).

§ 333. *Thirdly*, if, from the nature of the action, or indictment, or from the form of the pleadings, the *defendant must know* that he will be charged with the possession of an instrument, and be *called upon to produce* it, no notice to produce need be served upon him (*l*). Thus, in an action of trover for converting a bond, a bill of exchange, or other writing (*m*), or in a prosecution for

(*f*) *Lanauze v. Palmer*, M. & M. 31, per Abbott, C. J.

(*g*) *Jory v. Orchard*, 2 B. & P. 39.

(*h*) *Colling v. Treweek*, 6 B. & C. 394 ; 9 D. & R. 456, S. C. This case was decided on § 23 of the repealed act, 2 Geo. 2, c. 23, but it is equally applicable to § 37 of 6 & 7 Vict., c. 73, which is cited ante, § 209, n. (*c*).

(*i*) *Grove v. Ware*, 2 Stark. R. 174.

(*j*) *Robinson v. Brown*, 16 Law J. (N. S.) C. P. 46. *3 L. J. 545* (*k*) *Id.*

(*l*) *Colling v. Treweek*, 6 B. & C. 398, 399, per Bayley, J. See ante, §§ 299, 300.

(*m*) *Scott v. Jones*, 4 Taunt. 865 ; *How v. Hall*, 14 East, 275 ; *Bucher v. Jar-ratt*, 3 B. & P. 143. These cases overrule *Cowan v. Abrahams*, 1 Esp. 50.

stealing any document (*n*), the counsel for the plaintiff or the crown may at once produce secondary evidence of its contents, even though the defendant should offer to produce the document itself (*o*); and this exception has been recognised in an action of assumpsit against a carrier for the non-delivery of written instruments (*p*), as also in indictments for conducting a traitorous correspondence (*q*). It has, however, been held inapplicable, on a charge of forging a deed (*r*); and it may be safely asserted, that an indictment for arson, with intent to defraud an insurance office, does not convey such a notice that the policy will be required, as to dispense with a formal notice to produce (*s*). So, if an action is brought against the maker of a note or cheque, or against the acceptor of a bill, and the defendant does not by his plea deny the making or acceptance, the plaintiff, not being bound to produce the instrument as part of his case, it being admitted on the record, may refuse to produce it to the defendant for the purpose even of being identified, and may object to the defendant's giving secondary evidence of its contents, unless a notice to produce has been duly served (*t*).

§ 334. *Fourthly*, in odium spoliatoris, a notice need not be given to the adverse party to produce a paper, of which he has fraudulently or forcibly obtained possession, as where, after action brought, he has received it from a witness, in fraud of a subpœna duces tecum (*u*).

§ 335. *Fifthly*, the legislature has interfered in behalf of merchant

(*n*) *R. v. Aickles*, 1 Lea. 297, n. (*a*); *R. v. Brennan*, 3 Cr. & Dix, Ir. Cir. R. 109, per Perrin, J.

(*o*) *Whitehead v. Scott*, 1 M. & Rob. 2, per Lord Tenterden.

(*p*) *Jolley v. Taylor*, 1 Camp. 143, per Sir J. Mansfield, C. J.

(*q*) *R. v. De La Motte*, 1 East, P. C. 124; *Layer's case*, 16 How. St. Tr. 170, 171.

(*r*) *R. v. Haworth*, 4 C. & P. 254, per Parke, J. See *Spragge's case*, cited by Lord Ellenborough, 14 East, 276.

(*s*) *R. v. Ellicombe*, 5 C. & P. 522, per Littledale, J.; 1 M. & Rob. 260, S.C. See *R. v. Humphries*, cited 2 Russ. C. & M. 745. See also *R. v. Mortlock*, 7 Q. B. 459.

(*t*) *Goodered v. Armour*, 3 Q. B. 956; explaining *Read v. Gamble*, 5 N. & M. 433; 10 A. & E. 597, n. (*a*), S. C.; *Lawrence v. Clark*, 14 M. & W. 250, 253.

(*u*) *Leeds v. Cook*, 4 Esp. 256, per Lord Ellenborough; *Doe v. Ries*, 7 Bing. 724.

seamen, whose proverbial inexperience and sublime indifference to consequences have rendered them fit objects for special statutory protection, and has provided, that no seaman shall in any case be required to produce his written agreement with the master of the ship, or the certified and deposited copy thereof, or to give notice for its production; but, in case the agreement shall not be produced and proved, he shall be at liberty to prove its contents or purport, or to establish his claim by other evidence, according to the nature of the case (*v*).

§ 336. *Lastly*, notice will not be required, either where the adverse party or his attorney has admitted the loss of the document, for in such case the notice would be nugatory (*w*), or, it seems, where the party in possession of the writing might himself give secondary evidence of its contents without producing it, as, for instance, if it be an inscription or notice attached to the freehold (*x*). A party, however, cannot, under this exception, call witnesses to prove the destruction of a document that has been traced into the hands of his opponent, and then show its contents by secondary proof without serving a notice to produce, because, notwithstanding evidence to the contrary, the document may still be in existence, and, at any rate, the opponent may dispute the fact of its destruction (*y*).

§ 337. Where a notice to produce is not rendered unnecessary by virtue of one or other of these grounds, the mere proof that the adverse party, or his attorney, has the original instrument in court, will not, on failure of notice, authorise the admission of secondary evidence; for the object of the notice is not only to procure the paper, but to give the opposite party an opportunity of providing the proper testimony to support or impeach it (*z*).

(*v*) 7 & 8 Vict. c. 112, § 5. See *Bowman v. Manzelman*, 2 Camp. 315, which decides the same point, on the construction of the repealed stat. 2 Geo. 2, c. 36, § 8.

(*w*) *R. v. Haworth*, 4 C. & P. 254, per Parke, J.; *Foster v. Pointer*, 9 C. & P. 718, per Gurney, B.; *How v. Hall*, 14 East, 276, per Lord Ellenborough; *Doe v. Spitty*, 3 B. & Ad. 182. (*x*) *Bartholomew v. Stephens*, 8 C. & P. 728, per Patteson, J.

(*y*) *Doe v. Morris*, 3 A. & E. 46; 4 N. & M. 598, S. C.

(*z*) *Bate v. Kinsey*, 1 C. M. & R. 38; *Cook v. Hearn*, 1 M. & Rob. 201, per Patteson, J.; *Doe v. Grey*, 1 Stark. R. 284, per Lord Ellenborough; *Exall v. Partridge*, *id.* cited, as ruled per Lord Kenyon.

§ 338. Secondary evidence is, in the fourth place, admissible, where a document is in the hands of a third party, who is *not compellable by law* to produce it, and who *refuses* to do so, either when summoned as a witness with a subpoena duces tecum (*a*), or when sworn as a witness, without a subpoena, if he admits that he has the document in court (*b*). The reason of this rule is the same as that which admits parol proof, when the adversary, after notice, refuses to produce a deed in his possession,—namely, that the party offering secondary evidence has done all in his power to obtain the original document (*c*). It may, therefore, be questionable, whether, in the event of an attorney declining to produce an instrument on the ground of privilege, it be not necessary to show that his client has also been subpoenaed, and has relied on his right to withhold the deed (*d*); and this course would certainly be prudent, inasmuch as the privilege is not, in strictness, that of the attorney, but of the client. It seems that, upon principles of reason and equity, judges will refuse to compel a witness to produce, either his title-deeds (*e*), or any document on which he may have a lien (*f*), or the production of which may tend to criminate him (*g*); and if the witness be an attorney, he will not be permitted to produce any instrument which he holds confidentially for his client, and which his client has the right to keep back (*h*); though, in this last case, as we have just seen, it does not necessarily follow, that, in the event of the client himself not being summoned, secondary evidence will be admissible.

§ 339. The rule exempting witnesses from producing title-deeds

(*a*) *Marston v. Downes*, 1 A. & E. 31; 4 N. & M. 861; 6 C. & P. 381, S. C.; *Doe v. Ross*, 7 M. & W. 102; *Mills v. Oddy*, 6 C. & P. 728, per Parke, B. The case of *Doe v. Owen*, 8 C. & P. 110, can no longer be supported.

(*b*) *Doe v. Clifford*, 2 C. & Kir. 448, per Alderson, B.

(*c*) *Doe v. Ross*, 7 M. & W. 122.

(*d*) *Id.*

(*e*) *Pickering v. Noyes*, 1 B. & C. 263; 2 D. & R. 386, S. C.; *Harris v. Hill*, 3 Stark. R. 140, per Abbott, C. J.; D. & R. N. P. R. 17, S. C.; R. v. Upper Bodington, 8 D. & R. 726; *Doe v. Clifford*, 2 C. & Kir. 448.

(*f*) *Doe v. Ross*, 7 M. & W. 102, 122; 8 Dowl. 389, S. C.; *Kemp v. King*, 2 M. & Rob. 437, per Lord Denman. These cases virtually overrule *Thompson v. Mosely*, 5 C. & P. 501.

(*g*) See *Whitaker v. Izod*, 2 Taunt. 116.

(*h*) *Harris v. Hill*, 3 Stark. R. 140; *Doe v. James*, 2 M. & Rob. 47, per Lord Denman; *Ditcher v. Kenrick*, 1 C. & P. 161.

has been applied to a will, under which the witness claimed as devisee, though it was suggested that this will extended to personalty as well as realty, and, therefore, ought to have been deposited in the Ecclesiastical Court, where the public might have had access to it (*i*). Still, the mere circumstance, that the production of the document may render the witness liable to a civil action, does not come within the protection of the rule. Thus, in an action of ejectment, in which the lessor of the plaintiff claimed as devisee in remainder, and the defendant held under an invalid lease made by the late tenant for life, a witness, who was an executor and legatee of the late tenant for life, was compelled to produce his testator's rent-book, for the purpose of enabling the lessor of the plaintiff to identify the lands in question with the lands originally devised, though the witness, as executor, was bound to indemnify the defendant from all loss he might sustain from an adverse verdict, under a covenant contained in the lease granted by the late tenant for life (*k*). Where a witness, who was steward of a borough, and attorney for the lord, declined to produce certain old precepts, books of presentment, and a case, relative to his office, on which the opinion of counsel had been taken by a former steward, saying that he held them as attorney for the lord, and that their production would prejudice his client's interest, Lord Denman held that he was bound to produce the precepts and presentments, they being public documents, but that the case and opinion might be withheld (*l*).

§ 340. Fifthly, in consequence of the strong presumption, which arises from the undisturbed exercise of a public office, that the appointment to it is valid, the law does not, in general, require that the *written appointments of public officers* should be produced, but it will be sufficient to show that such officers have *acted* in an official capacity (*m*).

§ 341. A sixth relaxation of the rule demanding primary proof

(*i*) *Doe v. James*, 2 M. & Rob. 47, per Lord Denman.

(*k*) *Doe v. Date*, 3 Q. B. 609.

(*l*) *R. v. Woodley*, 1 M. & Rob. 390.

(*m*) See § 111, ante, and cases cited in notes thereto. See also *Brewster v. Sewell*, 3 B. & A. 302, per Holroyd, J.

has been admitted, where the evidence required is the result of *voluminous facts*, or of the inspection of *many books and papers*, the examination of which could not conveniently take place in court (*n*). Thus, if there be one invariable mode, in which bills of exchange have been drawn between particular parties, this may be proved by the testimony of a witness conversant with their habit of business, and speaking generally of the fact, without producing the bills; though, if the mode of dealing has not been uniform, the case does not fall within this exception, but is governed by the rule requiring the production of the writings (*o*). So, a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts (*p*). And, where the question is upon the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner (*q*). This exception, however, will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have since been destroyed, if the object of the examination be to elicit from the witness the impression which they produced on his mind, with reference to the degree of friendship subsisting between the writer and a third party (*r*). The distinction between this and the preceding cases is obvious; since, in those, the fact in question was one, the truth of which simply depended on the honesty of the witness, whereas here, not only his honesty, but his taste and feelings were involved; and he might, from perusing the letters, conscientiously draw a very different inference as to their legitimate construction, from that which would be drawn by an unbiassed jury.

(*n*) 1 Ph. Ev. 433. The rules of pleading have, for a similar reason, been made to yield to public convenience in the administration of justice; and a general allegation is frequently allowed, "when the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls shall be incumbered with the length thereof." *Mints v. Bethil*, Cro. Eliz. 749; *Steph. Pl.* 392—396. Courts of Equity admit the same exception in regard to parties to bills, where they are numerous, on the like grounds of convenience. *Story on Eq. Pl.* §§ 94, 95, et seq.

(*o*) *Spencer v. Billing*, 3 Camp. 310, per Lord Ellenborough.

(*p*) *Roberts v. Doxon*, Pea. B. 83, per Lord Kenyon.

(*q*) *Meyer v. Sefton*, 2 Stark. B. 274, per Holroyd, J.

(*r*) *Topham v. M'Gregor*, 1 C. & Kir. 320, per Rolfe, B.

§ 842. It remains only to notice as a seventh rule, that secondary evidence is admissible in the examination of a witness on the *voir dire*, and in *preliminary* inquiries of the same nature. This rule has become of little practical value since the passing of 6 & 7 Vict. c. 85, and the consequent competency of almost all witnesses formerly excluded from interest or crime; but, as it may still operate, in the event of any person being called as a witness, "in whose immediate and individual behalf any action may be brought or defended, either wholly or in part," it will be advisable briefly to allude to it. If upon such examination, the witness discloses the existence of a written instrument affecting his competency, he may also be interrogated as to its contents. To a case of this kind the general rule, requiring either the production of the instrument or notice to produce it, does not apply; for the objecting party may have been ignorant of its existence, until it was disclosed by the witness; nor could he be supposed to know that such a witness would be produced. So, if the witness, on the *voir dire*, admits a fact that would render him incompetent, unless its effect were subsequently removed by a written document, he may speak to the contents of such writing, even though it be a record, without producing it; the rule being, that, where the objection arises from the answer of the witness on the *voir dire*, it may likewise, on the *voir dire*, be removed by parol (s). If, however, the witness produces the writing, or admits that it is in court, it must be read, as being the best evidence; and if it be invalid for want of a stamp, it will neither prevent nor restore the competency of the witness (t). The fact that the witness appears by the record to be incompetent makes no difference in the principle of this exception; for the objecting party is the less likely to be prepared to prove, by the best evidence, the incompetency of such a witness, as he cannot expect that he will be called; and, as the witness himself knows nothing of the record, he cannot be presumed to have had notice

(s) *Butchers' Co. v. Jones*, 1 Esp. 160, per Lord Kenyon; *Botham v. Swingler*, id. 164, per id.; *R. v. Gisburn*, 15 East, 57; *Sewell v. Stubbs*, 1 C. & P. 74; *Carlisle v. Eady*, id. 234, per Park, J.; 1 Ph. Ev. 154, 155; *Miller v. Mariners' Church*, 7 Greenl. 51.

(t) *Quarterman v. Cox*, 8 C. & P. 97, per Coleridge, J.; *Butler v. Carver*, 2 Stark. R. 433, per Abbott, C. J.; *Godmanchester v. Phillips*, 6 N. & M. 211.

of the objection that would be made to his testimony (*u*). This exception is strictly confined to examinations of the witness himself on the *voir dire*; and, therefore, if a party, objecting to a witness, endeavours to establish his incompetency by independent proof, or if a party, seeking to call a witness who has been objected to, adopts a similar course in order to prove his competency; in either case, the ordinary rule will prevail, and the best evidence must be produced (*v*).

§ 343. Passing now to the consideration of the circumstances, under which *secondary evidence of oral testimony* will be received, and bearing in mind the broad proposition before stated (*w*), that such proof is only admissible where the production of primary evidence is out of the party's power, it may be advanced as a general rule of law, that where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given, will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relate to the same subject, or substantially involve the same material questions (*x*). In discussing the effect and extent of this rule, it seems almost needless to observe, that in order to render admissible secondary evidence of the testimony of a witness, it must be proved that the witness was *duly sworn* in some judicial proceeding, to the authority of which, the party, against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the *right of cross-examination*; for if this were not the case, the preposterous consequence would follow, that secondary evidence of testimony might be received under circumstances that would exclude the testimony itself. If, therefore, it should appear

(*u*) *Lunniss v. Row*, 10 A. & E. 606, 609, per Little Dale, J.; overruling *Goodhay v. Hendry*, M. & M. 319.

(*v*) *Botham v. Swingle*, 1 Esp. 165, per Lord Kenyon; *Corking v. Jarrard*, 1 Camp. 37, per Lord Ellenborough. (*w*) *Ante*, § 312.

(*x*) B. N. P. 239—243; *Mayor of Doncaster v. Day*, 3 Taunt. 262; *Strutt v. Bovingdon*, 5 Esp. 56, per Lord Ellenborough; *R. v. Jolliffe*, 4 T. R. 290, per Lord Kenyon; *Pyke v. Crouch*, 1 Lord Raym. 730, 5th Res.; *Wright v. Doe dem. Tatham*, 1 A. & E. 3; *Glass v. Beach*, 5 Vern. 172; *Lightner v. Wike*, 4 Serg. & R. 203.

that depositions were taken, either by parties not legally authorised to take them (*y*), or without the sanction of an oath or affirmation, or in the absence of the party (*z*) against whom they are offered, when, as in most criminal investigations, his presence was requisite, they cannot be received (*a*). But although the party, against whom depositions are offered in evidence, must have had an opportunity of being present at the examination, and of cross-examining the witnesses (*b*); and therefore, if a commission be executed without any notice being given to the opposite party, to enable him, if he pleases, to put cross-interrogatories, the depositions will be rejected (*c*); yet, it is by no means requisite that he should exercise that power; and if notice has been given to him of the time and place of the examination, and he neither intimates any wish to cross-examine, nor applies to the Court to enlarge the time for that purpose, it will be presumed that he has acted advisedly, and the depositions will be received (*d*). So, where a defendant, after joining the plaintiff in obtaining an order for a commission to examine witnesses upon interrogatories, gave notice that he declined to proceed with the examination; whereupon the plaintiff sent him word that he should apply for a commission *ex parte*, which he accordingly did; the Court held that the examinations taken under this last order were admissible in evidence, although the defendant had received no notice of the time and place of taking them (*e*).

§ 344. The admissibility of this evidence seems to turn, rather on the right to cross-examine, than upon the precise identity, either of the parties or of the points in issue, in the two proceedings.

(*y*) 12 Vin. Ab. Ev. A. b. 31; B. N. P. 241.

(*z*) The admissibility of depositions taken before a coroner, in the absence of the accused, will be discussed hereafter. See Index, tit. *Coroner*.

(*a*) In *R. v. Eriswell*, 3 T. R. 721, Lord Kenyon laid down that "the evidence should be given under the sanction of an oath legally administered, and in a judicial proceeding depending between the parties affected by it, or those who stand in parity of estate or interest with them."

(*b*) *Att.-Gen. v. Davison*, M'Clel. & Y. 160.

(*c*) *Steinkeller v. Newton*, 1 Scott, N. R. 148; 8 Dowl. 579; 9 C. & P. 313, S.C.

(*d*) *Cazenove v. Vaughan*, 1 M. & Sel. 4.

(*e*) *M'Combie v. Anton*, 6 M. & Gr. 27.

Therefore, where a witness testified in a suit, wherein A. and several others were plaintiffs and B. defendant, his testimony was, after his death, held admissible in a subsequent action relating to the same matter, brought by B. against A. alone (e). And though the two trials were not between the same parties, yet, if the second trial is between those, who represent the former parties, and claim through them by some title acquired subsequently to the first trial, the evidence is admissible (f). Again, if in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relate to other lands (g). So, in criminal cases, a deposition taken on a charge of assault and robbery, has, after the death of the witness, been read upon a trial for murder, where the two charges related to the same transaction (h). Indeed, it has been very sensibly observed, that, if this were not the law, the depositions of the deceased would, in all cases of homicide, be most improperly excluded (i). In one case (j), where a prisoner, who had been summarily convicted of an assault, was, in consequence of the death of the party struck, subsequently indicted for murder, the convicting magistrate was permitted to state what the deceased had sworn in the prisoner's presence, the examination not having been reduced into writing; but the learned judge appears to have received the evidence, not as proving the facts stated, but as producing an answer from the prisoner. Still, it is contended on the authority of Smith's case, cited above, that the statement of the deceased in this case was admissible for all purposes, though had it been reduced to writing at the time, it would doubtless have been more satisfactory.

§ 345. If, however, the point in issue, though very similar, was so far different in the two proceedings, that a witness called to prove or disprove the issue in the former need not have been

(e) *Wright v. Doe dem. Tatham*, 1 A. & E. 3.

(f) *Com. Dig. Ev. A. 5*, explained by *Littledale, J.*, in *Doe v. Derby*, 1 A. & E. 790.

(g) *Doe v. Foster*, 1 A. & E. 791, n. (b), per *Alderson, B.*; *B. N. P.* 232.

(h) *R. v. Smith*, R. & R. 339; 2 *Stark. R.* 208, S. C.

(i) 2 *Stark. R.* 212, note by the reporter.

(j) *R. v. Edmunds*, 6 C. & P. 164, per *Tindal, C. J.*

cross-examined in regard to the matters in controversy in the latter, it would seem that, on principle, the testimony would be excluded ; and therefore, in America, where the issue in the former action had been upon a common or free fishery, and that in the latter was upon a several fishery, evidence of what a witness, since deceased, had sworn upon the former trial, was held inadmissible (*k*).

§ 346. In stating that this rule mainly depends on the right of cross-examination, care must be taken to guard against the error of imagining, that, whenever a party has had the right of cross-examining a witness, he will be liable to have the statement of that witness adduced against him in any subsequent action. This will be so only in the event of *his opponent being the same in both suits* ; because, the right to use evidence, other than admissions, being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour, which, had it been tendered against him, would have been clearly inadmissible (*l*). On the same ground of want of *reciprocity*, it has been held, that, on an issue from Chancery between A. and B., depositions produced by B. in an equity suit of C. against B., could not be read as part of A.'s evidence, though the question in both suits was precisely the same (*m*). It might appear at first sight that these depositions, having been used by the party himself against whom they were offered in evidence, would, in spite of a want of mutuality, be admissible as admissions, and the correctness of this decision has consequently been questioned by more than one able writer on the law of evidence (*n*) ; but the Court of Queen's Bench has given the true answer to this argument, by pointing out that a party, who uses depositions in equity, does not know beforehand what they are, and therefore is no further bound by their contents, than he would be by the *vivâ voce* testimony of a witness whom he might call at *Nisi Prius* (*o*).

(*k*) *Melvin v. Whiting*, 7 Pick. 79. See also *Jackson v. Winchester*, 4 Dall. 206.

(*l*) *Doe v. Derby*, 1 A. & E. 783, 786.

(*m*) *Atkins v. Humphreys*, 1 M. & Rob. 523, per Tindal, C. J. ; *Rushworth v. Countess of Pembroke*, Hard. 472.

(*n*) 1 St. Ev. 312, n. (*w*) ; Ph. & Am. Ev. 571, n. (2).

(*o*) *Brickell v. Hulse*, 7 A. & E. 456—458, per Lord Denman, and Coleridge, J.

§ 347. We have seen that secondary evidence of oral testimony cannot be received so long as the witness himself can be called ; but the inability to call him may arise, not only from his death, but from his being, either out of the jurisdiction of the Court, or, it seems, unable to be found after diligent inquiry, or insane, or permanently sick, or kept out of the way by the contrivance of the opposite party, or subsequently so interested in the event of the cause, as to render his *vivâ voce* testimony inadmissible. In noticing the authorities which support these propositions, no case need be cited to establish what is admitted on all hands, that if the witness be proved to be *dead*, secondary evidence of his statement on oath in a former trial between the same parties will be received as of course (*p*). The Court, however, unless some account of the death of a witness be given, or at least some evidence be furnished showing that proper inquiries have been made, and that no tidings can be heard of him, will not presume his death, so as to admit his depositions, though they were taken as much as fifty years before the trial (*q*).

§ 348. The ground for admitting secondary evidence seems equally clear, where it is proved that the witness is actually residing in some place *beyond the jurisdiction* of the Court (*r*) ; but questions have occasionally arisen respecting the amount and nature of the proof required to establish this fact. Thus, where a naval captain had been examined on interrogatories by consent, on account of his expected absence, Sir James Mansfield held that it was not absolutely necessary that he should be on his voyage, when the trial came on. If the ship had sailed, though it had put back, or if the witness had gone on board, and was ready to sail, though prevented by contrary winds, that would be sufficient (*s*). The same doctrine has prevailed in another case, where the signature of an attesting witness was allowed to be proved, it appearing that he had sailed for Spain, had been driven back by stress of weather, and, six days before the trial, was at Falmouth, expecting to sail again immediately (*t*). In a third case, too, where it was sworn

(*p*) *Pyke v. Crouch*, 1 Lord Raym. 730, 5th Res.

(*q*) *Benson v. Olive*, 2 Str. 920. See ante, § 124. (*r*) *Fry v. Wood*, 1 Atk. 445.

(*s*) *Fonsick v. Agar*, 6 Esp. 92. But see *Carruthers v. Graham, C. & Marsh*. 5, cited post, § 367.

(*t*) *Ward v. Wells*, 1 Taunt. 461.

that the witness was a seafaring man, and some six months before the trial had belonged to a ship lying in the Thames, Lord Ellenborough, in rejecting the evidence as too vague, was disposed to admit the depositions, if it could be further shown that any efforts had been recently made to find him (*t*). This case leads us to notice an old decision of the time of James the First (*u*), in which it was expressly laid down that, if a party *cannot find* a witness, then he is, as it were, dead to him; and his depositions in a cause betwixt the same parties may be read, provided the party make oath that he endeavoured to find him, but could neither see him nor hear of him. There is no modern decision on precisely the same point, but as it has frequently been held that proof of inability to find an attesting witness will let in evidence of his handwriting (*v*), it is submitted that these analogous cases considerably support the correctness of the old authority, at least so far as relates to civil causes.

§ 349. In criminal proceedings it would seem that a similar latitude is not allowable, since the judges, in Lord Morley's case (*w*), resolved, that the examination of a witness taken before the coroner was not rendered admissible, on mere proof that the witness himself could not be found after diligent search. Mr. Justice Coltman is reported to have gone further, and to have rejected the deposition of a witness who had gone abroad (*x*); but this ruling is contrary to the law as laid down by Mr. Justice Buller in his work on *Nisi Prius* (*y*), and does not appear to rest upon any sound principle. However, this kind of evidence has been rejected in America, both where the witness could not be found within the jurisdiction, but was reported to have gone to an adjoining State (*z*), and where he was proved to have left the State, after being summoned to attend at the trial (*a*). Perhaps this last case furnishes the true key to the ruling of the judges in Lord

(*t*) *Falconer v. Hanson*, 1 Camp. 171.

(*u*) Godb. 326.

(*v*) *Kay v. Brookman*, 3 C. & P. 555; *Cunliffe v. Sefton*, 2 East, 183; *Crosby v. Percy*, 1 Taunt. 364; *Earl of Falmouth v. Roberts*, 9 M. & W. 469; *Parker v. Hoskins*, 2 Taunt. 223; *Burt v. Walker*, 4 B. & A. 697.

(*w*) Kel. 55, 6th Ed.; 6 How. St. Tr. 771, S. C.

(*x*) *R. v. Hagan*, 8 C. & P. 167.

(*y*) B. N. P. 242.

(*z*) *Wilbur v. Selden*, 6 Cowen, 162.

(*a*) *Finn's case*, 5 Rand. 701.

Morley's case, and to that of Mr. Justice Coltman in *R. v. Hagan*; for it might be reasonably suspected in both these cases, that as the witnesses were not forthcoming after having had notice that their attendance would be required at the trial, they had *purposely absconded*, from a consciousness of the inaccuracy of their former statement. Regarded in this light the decisions are sound law; and the evidence that was rejected by each of them would, under similar circumstances, have been held inadmissible in a civil cause.

§ 350. How far *answers to inquiries* respecting the witness are admissible to prove that he cannot be found, is not very clearly defined by the decisions. That such answers will be rejected as hearsay, if tendered in proof of the fact that the witness is abroad is beyond all doubt (*b*); but where the question is simply whether a diligent and unsuccessful search has been made for the witness, it would seem, both on principle, and on authority, that the answers should be received, as forming a prominent part of the very point to be ascertained (*c*). In order to show that inquiries have been duly made at the house of the witness, his declarations as to where he lived cannot be received (*d*); neither will his statement in the deposition itself that he is about to go abroad, render it unnecessary to prove that he has put his purpose in execution (*e*).

§ 351. If the witness be proved at the trial to be *insane*, his deposition will be admissible in the same manner as if he were dead (*f*); and it has been said that this is so, though the insanity be only temporary (*g*). This, however, appears to be carrying the doctrine beyond its legitimate extent; for since the casual illness of a witness will not, as we shall presently see (*h*), warrant the reading of his former testimony, but will only furnish good ground for moving to postpone the trial, the same rule should

(*b*) *Robinson v. Markis*, 2 M. & Rob. 375, per Lord Abinger; *Doe v. Powell*, 7 C. & P. 617, per id.; post, § 367.

(*c*) *Wyatt v. Bateman*, 7 C. & P. 586, per Coleridge, J.; *Burt v. Walker*, 4 B. & A. 697.

(*d*) *Doe v. Powell*, 7 C. & P. 617.

(*e*) *Proctor v. Lainson*, 7 C. & P. 631, per Lord Abinger.

(*f*) *R. v. Eriswell*, 3 T. R. 720, 721, per Ashhurst, J., and Lord Kenyon.

(*g*) *R. v. Marshall*, C. & Marsh. 147, per Ludlow, S., after consulting Coltman, J.

(*h*) Post, § 362.

surely prevail in the event of a witness being afflicted with temporary madness. No sensible distinction can be drawn between the two cases. Where depositions are tendered on the ground of the witness being insane, it may sometimes be advisable to show that his intellects were sound at the time of his previous examination; and this course may even be necessary, if such examination were had but a short time before the trial (*i*).

§ 352. It is somewhat difficult to discover from the authorities what *degree of illness* must be proved in order to let in depositions at common law. In an old case, where a witness on his journey to the place of trial, was taken so ill as to be unable to proceed, his deposition was allowed to be read (*j*); but too much weight must not be given to this decision, since, if the course there adopted were ordinarily allowed, there would be very sudden indispositions and recoveries (*k*). The rule laid down by Lord Ellenborough, that, where a witness is taken ill, the party requiring his testimony should move to *put off the trial*, is certainly less open to objection and abuse (*l*). In the criminal courts, this practice has long prevailed, and it has there been expressly decided, that the deposition of a woman, who was so near her confinement as to be unable to attend a trial, could not be received (*m*). If, however, from the nature of the illness or other infirmity, no reasonable hope remains that the witness will be able to appear in court on any future occasion, it seems that his depositions are admissible in criminal (*n*), as they certainly are in civil (*o*), courts.

§ 353. The proposition that, if a witness be *kept out of the way*

(*i*) *R. v. Wall*, per Park, J., cited 2 Russ. C. & M. 890.

(*j*) *Lutterell v. Reynell*, 1 Mod. 284.

(*k*) *Harrison v. Blades*, 3 Camp. 458, per Lord Ellenborough; *Jones v. Brewer*, 4 Taunt. 47, per Heath, J.

(*l*) *Harrison v. Blades*, 3 Camp. 458.

(*m*) *R. v. Savage*, 5 C. & P. 143, per Patteson, J.

(*n*) *R. v. Hogg*, 6 C. & P. 176, per Gurney, B.; *R. v. Edmunds*, id. 163, per Tindal, C. J.; *R. v. Wilshaw*, C. & Marsh. 145.

(*o*) *Jones v. Jones*, 1 Cox, 184; *Andrews v. Palmer*, 1 Ves. & B. 22; *Fry v. Wood*, 1 Atk. 445; *Corbett v. Corbett*, id. 335, 336. The case of *Doe v. Evans*, 3 C. & P. 219, where Vaughan, J., is said to have rejected the depositions of a witness, who was bed-ridden and nearly a century old, and quite unable to attend the trial, is obviously not law.

by the adversary, his former statements on oath will be admissible, rests partly on the authority of several old decisions, both in the civil and criminal courts (*p*), and of a modern dictum by Mr. Baron Parke (*q*); partly on the analogies furnished by one or two statutes (*r*); but chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong.

§ 354. The effect of a *disqualifying interest, subsequently acquired* by the witness, as laying the foundation for the admission of proof of his former testimony, remains to be considered. In courts of equity, it has long been the established practice to admit the deposition of a witness, who has become interested by operation of law, in the same manner, and to the same extent, as if he were dead, insane, or otherwise incapacitated; and the same rule prevails on the trial, at law, of an issue out of Chancery. Thus, where a plaintiff in equity died, and his executor, who had been previously examined as a witness, revived the suit, the deposition of such executor has, on several occasions, been ordered to be read (*s*). In *Glynn v. The Bank of England* (*t*), Lord Hardwicke thus laid down the law. "Where a witness is examined on interrogatories, being at that time indifferent, and afterwards by accident becomes interested in the matter in question, the Court has suffered his deposition to be read, and on just reason; because his evidence must be taken as it stood at the time of his examination, which should not be set aside, unless it could be supplied by other evidence."

(*p*) Lord Morley's case, Kel. 55, 5th Res.; 6 How. St. Tr. 770, 771, S. C.; *R. v. Harrison*, 12 How. St. Tr. 851, 852, 868, per Lord Holt; *Green v. Gatewick*, B. N. P. 243. There "a witness was sworn in a trial at bar in C. B. between the same parties on the same issue, and he was subpoenaed by the defendant to appear at a second trial in K. B. and his charges given him, but he not appearing, persons were admitted to swear what he swore in C. B., for the Court said they would presume he was kept away by the plaintiff's practice.—This supposition was strengthened by his having been produced by the plaintiff at a former trial." It may be doubted whether, at the present day, the Courts would feel authorised in making so offensive a presumption on such slight grounds; but the principle of the case would probably be recognised.

(*q*) *R. v. Guttridge*, 9 C. & P. 473. See also *Egan v. Larkin*, 1 Arm. Mac. & Ogle, 403, per Brady, C. B.

(*r*) See 50 Geo. 3, c. 102, § 5; and 56 Geo. 3, c. 87, § 3, noticed post, § 358.

(*s*) *Andrews v. Beauchamp*, 7 Sim. 65; *Haws v. Hand*, 2 Atk. 615; *Goss v. Tracy*, 1 P. Wms. 288, 289, per Lord Cowper; 2 Vern. 699, S. C. (*t*) 2 Ves. Sen. 42.

§ 355. It is said that, except in the case of issues out of Chancery, the Common Law Courts will reject the former testimony of a witness, who, from subsequently acquiring an immediate interest in the suit, cannot himself be called, and two decisions of the olden time certainly support this view of the law. In the first, which was Tilley's case (*u*), depositions in perpetuam rei memoriam had been taken in Chancery, and the inheritance in question afterwards descending to the witness, he became party to an action of ejectment. At the trial, his depositions were tendered in evidence; but the judges of the Common Pleas, and of the King's Bench, with Lord Holt at their head, rejected this proof, observing that, as the depositions could not be read in any case between other parties till after the death of the witness, much less could they be read where the witness himself was a party. Now, unless there be some broad distinction between depositions taken to perpetuate testimony and other examinations, it is quite clear that the first proposition advanced by Lord Holt cannot be sustained; and as the second rests in a great measure upon the first, it can scarcely be entitled to any great weight. If, indeed, depositions for perpetuating testimony are so far distinguishable from other depositions, as to be governed by different legal principles, then the case may be sound law, but its authority on the general question falls to the ground; and with it falls also the case of *Baker v. Lord Fairfax* (*v*), where the depositions of a witness, who had become interested after his examination in equity, were rejected at the trial of an issue out of Chancery, the Court feeling themselves bound by the decision in Tilley's case. In opposition to these authorities, it has been stated by Lord Hardwicke, that, "in courts of law, if a subscribing witness to a bond happens to be afterwards representative of the obligee, and is forced to bring an action, you can never examine the plaintiff there; but the rule is to suffer his hand to be proved in like manner as if he had been dead" (*w*); and in *Hovill v. Stephenson* (*x*), Lord Chief Justice Best observed, "There are many cases, where a subscribing witness has acquired an interest after the execution of the instrument attested by him, in which it has

(*u*) 1 Salk. 286; 2 Lord Raym. 1009, S. C.

(*v*) 1 Str. 101.

(*w*) *Glynn v. Bank of England*, 2 Ves. Sen. 42.

(*x*) 5 Bing. 496, 497.

been decided, that proof of his handwriting may be received to establish such instrument. The handwriting of a subscribing witness, who has been appointed an executor or administrator, or has married the person to whom the instrument was given (*y*), has been allowed to be proved. We do not dispute the authority of any of those decisions; on the contrary, we should be disposed to extend the principle established by them to the case of a man entering into a partnership, and becoming interested in instruments by acquiring a share in the credits, and taking upon himself the responsibilities of the firm of which he becomes a member. Necessity requires that, in all these cases, such evidence should be received, as otherwise parties must lose the right secured by the instruments attested, or forego accepting of situations most important to their welfare. It would be a hard thing, if the law were to say, that a man should not become an executor or administrator, or accept a beneficial partnership, without giving up debts due to the estates in which he has acquired an interest."

§ 356. It is true that the instances cited in these extracts are, in words, confined to cases, where proof of the signature of an attesting witness will be admissible; but as it is hardly possible to conceive a reason for admitting evidence of handwriting, which does not equally apply to the admission of proof of former testimony, it may, perhaps, be safely asserted, notwithstanding the old authorities to the contrary, that, in all cases, whether at law or equity, the competent depositions or oral testimony of witnesses, who are rendered subsequently incompetent by accident or operation of law, will be receivable in evidence. If, indeed, after a witness has attested an instrument for a party, or has given a deposition in his favour, that party should *voluntarily* confer upon him such an immediate interest in the subject matter of the suit, as should disqualify his evidence, neither the party nor the witness could complain, though the Court should hold, as they have done, that the signature of the witness could not be proved in the one case, nor his deposition read in the other (*z*); but as, since Lord Denman's act (*a*),

(*y*) *Buckley v. Smith*, 2 Esp. 697, per Lord Kenyon.

(*z*) See *Hovill v. Stephenson*, 5 Bing. 493, 497, 498.

(*a*) 6 & 7 Vict. c. 85, § 1.

this state of facts could scarcely exist, unless, perhaps, in the single instance of a witness being made by the landlord tenant of premises, which the latter was seeking to recover in ejectment, it is needless to discuss the question further in the present work.

§ 357. Besides those cases, in which the admissibility of secondary proof of oral testimony is found to rest upon the ordinary principles of common law, the legislature has, in a few instances, expressly provided, that certain depositions should, under particular circumstances, be received in evidence (*a*). Thus, the late statute for the amendment of the law of bankruptcy (*b*) enacts, in § 25, that, in the event of the *death* of any witness deposing to the petitioning creditor's debt, the trading, or the act of bankruptcy, under any fiat, his deposition, purporting to be sealed with the seal of the Court of Bankruptcy, or a *copy* thereof purporting to be so sealed, shall in all cases be receivable in evidence of the matters therein contained; and the old act of 6 Geo. 4, c. 16, enacts, in § 92, that, if the bankrupt, being within the United Kingdom, shall not within three months, or, being out of the kingdom, shall not within twelve months, after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions respecting the petitioning creditor's debt, and the trading and act of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions or suits by the assignees for any debt or demand, for which the bankrupt might have sustained any action or suit (*c*). It seems that these last provisions are still in force, notwithstanding the more modern statutes on the subject, and that the depositions will be admissible, though the witnesses *are not dead* (*d*).

§ 358. Again, the Irish act of 50 Geo. 3, c. 102, after the humiliating recital, that men, who have given information against persons accused of crimes in Ireland, have been murdered before the trial, in order to prevent their giving evidence, and to effect the acquittal of the accused, enacts (*e*), that if any person,

(*a*) See 6 & 7 Vict. c. 34, § 4.

(*b*) 5 & 6 Vict. c. 122. See also 2 & 3 Will. 4, c. 114, §§ 7, 9.

(*c*) See *Hare v. Waring*, 3 M. & W. 362; *Alsager v. Close*, 10 M. & W. 576.

(*d*) *Clark v. Mullick*, 3 Moore P. C. R. 281.

(*e*) § 5.

after giving information or examination upon oath against any person for any offence, shall, before the trial, be murdered or violently put to death, or so maimed, or forcibly carried away and secreted, as not to be able to give evidence on the trial, his information or examination shall be admitted in all courts of justice in Ireland, as evidence on the trial; provided, (and this is a remarkable proviso, since it differs from the ordinary rule of law on this subject) (*f*), that the information or examination of a witness secreted, shall not be evidence, unless it shall be found on a collateral issue, to be put to the *jury* trying the prisoner, that he was secreted by the person on trial, or by some person acting for him, or in his favour. By the subsequent stat. 56 Geo. 3, c. 87, § 3, informations or examinations, under similar circumstances, and after similar proof, are rendered receivable in evidence before the grand jury. Again, the Mutiny Act provides (*g*), that any justice, within whose jurisdiction any soldier having a wife or child shall be billeted, may summon him, and take his examination in writing upon oath, touching the place of his last legal settlement, and the justice shall give an attested copy of the examination to the person examined, to be by him delivered to his commanding officer, to be produced when required; and the examination and attested copy shall at any time be admitted in evidence as to such last legal settlement, before any justice, or at any sessions, although the soldier be dead or absent from the kingdom. A somewhat similar clause is inserted in the Marine Mutiny Act, but in order to give the justice jurisdiction, it is not necessary that the marine should have a wife or child (*h*).

§ 359. The preceding observations have been confined to cases where the oral testimony has been given, either in some different suit, from that in which the secondary evidence is tendered, or in a different stage of the same legal proceedings; but it now becomes necessary to advert to several acts of Parliament, which have entrenched upon the common-law rule, requiring the examination of witnesses *vivâ voce* in the presence of the jury, and which have, under certain circumstances, substituted for such examination the depositions of witnesses who have been previously examined in the

(*f*) Ante, § 21. (*g*) 10 & 11 Vict. c. 12, § 96. (*h*) 10 & 11 Vict. c. 13, § 88.

cause. The first Act relative to this subject was passed in 1773 (i), and, by the 40th sect. provides, that in all cases of indictments or informations, laid or exhibited in the Court of Queen's Bench for misdemeanors or offences committed in India, it shall be lawful for the said Court, upon motion to be made on behalf of the prosecutor (j) or defendant, to award a writ of mandamus, requiring the chief justice and judges of the Supreme Court of Judicature at Calcutta, Madras, or Bombay (k), to hold a court, with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments or informations; and, in the mean time, to cause such public notice to be given of the holding of the said court, and to issue such summons or other process as may be requisite for the attendance of the witnesses, agents, or counsel of the parties, and to adjourn, from time to time, as occasion may require; and such examination shall be publicly taken *vivâ voce* in the said court, upon the oaths of witnesses, and the oaths of skilful interpreters, administered according to the forms of their several religions; and shall, by some sworn officers of the court, be reduced into writing on parchment, in case any duplicates shall be required on behalf of any of the parties interested, and shall be sent to the Court of Queen's Bench closed up, and under the seals of two or more of the judges of the said court, and one or more of the said judges shall deliver the same to the agents of the parties requiring the same; which agents, or in case of their death, the person into whose hands the same shall come, shall deliver the same to one of the clerks of the Court of Queen's Bench, in the public office, and make oath that he received the same from the judges in India, or if the agent be dead, in what

(i) 13 Geo. 3, c. 63.

(j) If the Att.-Gen. move for the rule, his statement that it will be necessary is sufficient, without any affidavit. *R. v. Douglas*, 2 Dowl. N.S. 416.

(k) The act, after mentioning the Supreme Court at Fort William or Calcutta, directs that the writ shall be addressed "to the judges of the Mayor's Court at Madras, Bombay, or Bencoolen, as the case may require;" but subsequent acts have constituted supreme courts of judicature at Madras and Bombay, and have transferred to them the powers, &c., formerly exercised by the now abolished Mayor's Courts. See 39 & 40 Geo. 3, c. 79, §§ 2, 4, 5; 6 Geo. 4, c. 85, § 20; 4 Geo. 4, c. 71, §§ 7—17. Bencoolen, or Fort Marlborough, which was at one time the chief establishment of the East India Company in Sumatra, was, together with all the other settlements in that island, delivered up to the Dutch in the year 1825. See 1 Hamilton's East India Gazetteer, 172.

manner the same came into his hands ; and that the same has not been opened or altered since he received it, (which oath the clerk in court is required to administer) ; “and such depositions, being duly taken and returned according to the true intent and meaning of this act, shall be allowed and read, and shall be deemed as good and competent evidence, as if such witness had been present, and sworn and examined *vivâ voce* at any trial for such crimes or misdemeanors” in the Court of Queen’s Bench ; “and all parties concerned shall be entitled to take copies of such depositions at their own costs and charges.”

§ 360. Sect. 42 enacts, that, in all proceedings in Parliament touching any offences committed in India, the Lord Chancellor or Speaker of the House of Lords, and also the Speaker of the House of Commons, may issue their warrants to the Governor-General and Council, or to the chief justice and judges of the Supreme Court of Judicature at Calcutta, Madras, or Bombay (*l*), for the examination of witnesses ; and such examination shall be returned to the Lord Chancellor or Speakers respectively, and proceeded upon as if the directions contained in sect. 40 were again repeated ; and the examination, so returned, shall be deemed good evidence, and shall be allowed and read in the respective Houses. Sect. 45 provides, that no depositions returned by virtue of this act shall be given in evidence, in any capital case, other than such as shall be proceeded against in Parliament. Sect. 44 enacts, that, whenever the East India Company or any person shall commence any action or suit, in law or equity, for which cause hath arisen in India (*m*), against any other person, in any of the Courts at Westminster, such courts respectively (*n*) may, upon motion, award such writ in the nature of a mandamus or commission as aforesaid, to the chief justice and judges of the Supreme Court of Judicature at Calcutta, Madras, or Bombay (*o*), for the examination of witnesses ; and such examination, being duly returned, shall be allowed and read, and be deemed good evidence, at any trial or hearing between the parties in such cause or action, as if the directions prescribed in § 40 were again repeated.

(*l*) See n. (*k*), ante.

(*m*) See *Francisco v. Gilmore*, 1 B. & P. 177.

(*n*) *Savage v. Binny*, 2 Dowl. 643.

(*o*) See n. (*k*), ante.

§ 361. The provisions contained in § 40 of this statute were re-enacted in §§ 78 and 28 of the respective acts of 24 Geo. 3, c. 25, and 26 Geo. 3, c. 57, which regulate the trial of British subjects, who, while employed in India under the Crown or the East India Company, shall have been guilty of extortion or other misdemeanors; and a clause, substantially the same, though varying in some of the minute details, has been introduced into the act of 42 Geo. 3, c. 85 (*p*), which authorises the Court of Queen's Bench, in England, to try any person employed in the public service abroad, who, in the exercise, or under colour, of such employment, shall have committed any offence. By § 3 of this act, as also by § 81 of 24 Geo. 3, c. 25, the Court of Queen's Bench is further empowered, on motion to be made by the Attorney-General, prosecutor, or defendant, to order an examination *de bene esse* of witnesses upon interrogatories, in any case where the *vivâ voce* testimony of such witnesses cannot conveniently be had, to be taken before an examiner appointed by the Court; and the depositions taken thereupon shall be read, and deemed sufficient evidence, upon the trial of the indictment or information, or in any subsequent proceedings relating thereto, saving all just exceptions to be taken to the same, when they shall be offered to be read. The legislature has also, by the late act of 6 & 7 Vict. c. 98, § 4, extended the provisions contained in 13 Geo. 3, c. 63, § 40, to all indictments or informations laid or exhibited in the Court of Queen's Bench, for misdemeanors or offences committed against the acts passed for the suppression of the slave trade, in any places out of the United Kingdom, and within any British Colony, settlement, plantation, or territory; while, by the act of 1 Geo. 4, c. 101, the Speaker of either House of Parliament is authorised, upon the petition of any party praying for a bill for the dissolution of any marriage, to issue his warrant to the judges of the Supreme Courts at Calcutta, Madras, Bombay (*q*), or Ceylon, for the examination of witnesses;

(*p*) § 2. See as to mode of proceeding under this sect., *R. v. Jones*, 8 East, 31, where the Court held, that, to entitle a defendant to have his trial put off till the return of the writ of mandamus, he must state, by affidavit, such special grounds as will lead the judges to believe that the witnesses sought to be examined are really material for the defence.

(*q*) See *n. (k)*, ante.

and these examinations being duly taken, certified, and returned, shall be admitted as good evidence in both Houses of Parliament.

§ 362. Though by none of these statutes is the party, who seeks to use the depositions, directed to prove, that the witnesses, at the time of the trial, are beyond the jurisdiction of the Court, it would seem, upon general principle, that some slight evidence of this nature should be given; for although the language of the acts, rendering the depositions evidence, is exceedingly strong, it may well be doubted whether an express enactment would not be necessary, in order to override the long-established rule of law, that if a witness is living within the jurisdiction of the Court, and it is in the power of the party to call him, his deposition cannot be read. This view of the subject is confirmed by the subsequent enactments of 1 Will. 4, c. 22, Eng., and 3 & 4 Vict. c. 105, Ir., which expressly provide that depositions taken under them shall be deemed merely secondary proof.

§ 363. The act of 1 Will. 4, c. 22, after reciting that "great difficulties and delays are often experienced, and sometimes a failure of justice takes place, in *actions* depending in courts of law, by reason of the want of a competent power and authority in the said courts to order and enforce the examination of witnesses, when the same may be required before the trial of a cause;" and further reciting, that it is expedient to extend the powers and provisions contained in the act of 13 Geo. 3, c. 63, enacts, in § 1, "that all and every the powers, authorities, provisions, and matters, contained in the said recited act, relating to the examination of witnesses in India, shall be, and the same are * hereby extended to all colonies, islands, plantations, and places, under the dominion of His Majesty in foreign parts, and to the judges of the several courts therein, and to all *actions* depending in any of His Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court, to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority hereby given,

will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for" (*r*). The stat. 3 & 4 Vict. c. 105, contains a precisely similar enactment in § 66, with respect to the superior courts in Ireland, excepting only that, at the place marked above with an asterisk, the words "with reference to all *actions* in any of Her Majesty's courts of law at Dublin" are introduced; and we notice this, because the omission of corresponding words in the act of Will. 4 has raised a doubt whether that statute does not apply to criminal proceedings in the Court of Queen's Bench, as well as to actions in any of the superior law courts (*s*). However this may be, it is clear that neither of these acts applies to actions at the suit of the Crown; for the Crown is not bound unless specially named (*t*). Still less has the Court of Exchequer any power, either by statute or at common law, to direct a commission to issue, on the motion of the defendant, for the examination of witnesses abroad, where the Attorney-General has filed an information for penalties for a breach of the revenue laws (*u*); neither will the Court stay the proceedings in such a case, until the Attorney-General consents to the issuing of such commission; for it would be obviously most improper for the judges to attempt to affect by indirect means what they have no jurisdiction directly to do (*v*).

§ 364. The alterations effected by these acts do not rest here; but § 4 of the one, and § 69 of the other, respectively enact, that it shall be lawful for each of the law courts at Westminster or Dublin, and the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham (*w*), and the several judges thereof, "in every action depending in such court, upon the

(*r*) The costs of the writ or commission, whether under the act of 13 Geo. 3, c. 63, or of 1 Will. 4, c. 22, or of 3 & 4 Vict. c. 105, and of the proceedings thereon, are in the discretion of the Court issuing the same. See 1 Will. 4, c. 22, § 3, and 3 & 4 Vict. c. 105, § 68.

(*s*) *R. v. Wood*, 7 M. & W. 573, per Parke, B.

(*t*) *R. v. Wood*, 7 M. & W. 571; 9 Dowl. 310, S. C.

(*u*) *Att.-Gen. v. Bovet*, 15 M. & W. 60.

(*v*) *Att.-Gen. v. Bovet*, 15 M. & W. 70, 71, per Pollock, C. B.; 73, per Parke, B.

(*w*) § 11 provides that no order shall be made in pursuance of this act by a single judge of the Court of Pleas at Durham, unless he be a judge of one of the law courts at Westminster.

application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just" (x).

§ 365. It does not fall within the scope of this work to furnish minute directions as to the course to be pursued by parties seeking for a commission under these acts; but a few of the more important decisions may briefly be noticed. The Court will not make an order for the examination of witnesses on interrogatories, until after issue has been joined; for before that step has been taken it cannot be ascertained what witnesses are material, neither is it easy to discover how a false witness can be indicted for perjury (y): but it seems that such an order may be made prospectively, with reference to a new trial, in case the verdict already obtained should be set aside (z); and if the witness reside beyond the jurisdiction of the Court, the application should be made as soon as possible after issue is joined (a). The commission may be granted, though the action pending in the Court be merely an issue directed by the Court of Chancery (b); and though it be in the nature of a criminal charge (c); but neither § 4 of

(x) The costs of the rule or order, and of the proceedings thereupon, are to be costs in the cause, unless otherwise directed, either by the judge making the rule or order, or by the judge before whom the cause may be tried, or by the Court. See 1 Will. 4, c. 22, § 9; and 3 & 4 Vict. c. 105, § 74.

(y) *Mondel v. Steele*, 8 M. & W. 300; 9 Dowl. 812, S. C.

(z) *Hall v. Rouse*, 4 M. & W. 27, per Parke, B.

(a) *Brydges v. Fisher*, 4 M. & Scott, 458. But see *Weekes v. Pall*, 6 Dowl. 462.

(b) *Bourdeaux v. Rowe*, 1 Bing. N. C. 721; 1 Scott, 608, S. C.

(c) *Norton v. Melbourne*, 3 Bing. N. C. 67; 3 Scott, 398; 5 Dowl. 181, S. C., nom. *Norton v. Lamb*.

1 Will. 4, c. 22, nor the corresponding sect. of the Irish act, will apply to indictments ^{or to Criminal Informations. As before the Commission 17 & 18} (d), or to actions at the suit of the Crown (e). The *affidavit* in support of the motion must, except under very special circumstances (f), state the names of at least some of the witnesses proposed to be examined, or otherwise describe who they are (g); though, it seems, that to support a commission from the Court of Chancery, this precision will not be deemed essential, where the pleadings clearly show that the examination of witnesses is necessary (h). It should also state that the witnesses are material (i), though it need not, in general, add, either that their evidence is admissible, or that the application is made *bonâ fide*, or that the party moving has a good case on the merits (j); but, if the granting the commission would necessarily occasion great delay, the Court, in the exercise of their discretion, would, perhaps, require that the affidavit should point out, not only in what manner the evidence would be material, but also, that it would be admissible (k); and if there was reason to believe that the application was made by the defendant from a sinister motive, the rule would either be discharged, or the Court would order the defendant to bring the money in dispute into Court (l). In a recent case, where the defendant moved for a commission to examine witnesses in New Zealand, the Court refused to interfere, unless an affidavit could be produced from the defendant's *attorney*, showing that the evidence to be given by the persons proposed to be examined was material and *necessary* to the defence of the action (m). It must also appear by the affidavit, either that the

(d) *R. v. Lady Briscoe*, 1 Dowl. 520, per Parke, J.

(e) *R. v. Wood*, 7 M. & W. 571; 9 Dowl. 310, S. C.

(f) *Cow v. Kinnersley*, 7 Scott, N. R. 892; 6 M. & Gr. 981, S. C., where the defendant, who required the commission, was an executrix, and was ready to bring the amount claimed into court to abide the event.

(g) *Gunter v. M'Tear*, 1 M. & W. 201; 4 Dowl. 722, S. C. nom. *Gunter v. M'Kear*; *Beresford v. Easthope*, 8 Dowl. 294; *Dimond v. Vallance*, 7 Dowl. 590;

(h) *Carbonell v. Bessell*, 5 Sim. 636; *Rougemont v. Royal Ex. Ass. Co.*, 7 Ves. 304.

(i) *Norton v. Melbourne*, 3 Bing. N. C. 67; 3 Scott, 398; 5 Dowl. 181, S. C.

(j) *Baddeley v. Gilmore*, 1 M. & W. 50; Tyr. & Gr. 369, S. C.; *Westmoreland v. Huggins*, 1 Dowl. N. S. 800.

(k) *Lloyd v. Key*, 3 Dowl. 253, per Parke, B.

(l) *Sparkes v. Barrett*, 5 Scott, 402. (m) *Healy v. Young*, 2 Com. B. 702.

witness is out of the jurisdiction of the Court (*m*); or that he will be so at the time of the trial, being about to leave the country (*n*); or that he is in such a precarious state of health as to render it highly probable that he will be unable to attend the trial (*o*).

§ 366. Although in granting a commission to examine witnesses out of the jurisdiction of the Court, it is usual to introduce a clause requiring the commissioners to be sworn, this clause is not essential, and on two occasions it has been actually omitted, where in order to enforce the attendance of witnesses, the commission has been directed to the judges of a foreign court (*p*). From these cases, as well as from others (*q*), it is now perfectly clear that, under §§ 4 and 69 of the respective acts of 1 Will. 4, c. 22, and 3 & 4 Vict. c. 105, commissions may be granted to examine witnesses, while resident in countries beyond the dominion of the British Crown. If the witness reside in Scotland or Ireland, application for a commission to examine him must be made under § 4 of 1 Will. 4, c. 22, since the words "foreign parts," used in § 1, do not include those divisions of the United Kingdom (*r*). The same observation applies where the motion is made in Dublin, and the witness is resident in Scotland or England. The commission usually directs that the witnesses shall be examined upon written interrogatories; but this is a matter for the discretion of the Court, who may order, if they think fit, that the examination and cross-examination be conducted *vivâ voce*, either wholly or in part (*s*). In the event of such an order, the questions and answers are reduced into writing, and returned as in ordinary cases. In order to render the depositions taken under a commission available, the commissioners must substantially follow the instructions

(*m*) *Norton v. Melbourne*, 3 Bing. N. C. 67; 3 Scott, 398; 5 Dowl. 181, S. C.,

(*n*) *Pirie v. Iron*, 8 Bing. 143; 1 M. & Scott, 223; 1 Dowl. 252, S. C.

(*o*) *Abraham v. Newton*, 8 Bing. 274; 1 Dowl. 266; 1 M. & Scott, 384, S. C. nom. *Abraham v. Norton*; *Pond v. Dimes*, 3 M. & Scott, 161; 2 Dowl. 730, S. C.; *Davis v. Lowndes*, 6 Scott, 738; 7 Dowl. 101, S. C. In this last case the affidavit of a medical man was required.

(*p*) *Clay v. Stephenson*, 3 A. & E. 807; 5 N. & M. 318, S. C.; *Ponsford v. O'Connor*, 5 M. & W. 673; 7 Dowl. 866, S. C.

(*q*) *Duckett v. Williams*, 1 Cr. & Jer. 510; 1 Dowl. 291, S. C.

(*r*) *Wainright v. Bland*, 3 Dowl. 653.

(*s*) *Pole v. Rogers*, 3 Bing. N. C. 780.

they have received by the instrument appointing them, though the Court will not look out critically for objections to their conduct, but will rather in their favour presume that they have discharged their duty (*t*). Thus, where a commission, directed to the judges of a foreign court, required that when the examinations were taken, *the same* should be transmitted to this country, it was held insufficient to send mere copies of them (*u*); but where commissioners for the examination of witnesses abroad were directed to reduce the examinations into writing in the English language, and to swear an interpreter to translate the oath, interrogatories and depositions, the Court held that the commission was well executed by the return of depositions which had originally been taken down in the foreign language, and six weeks afterwards had been translated by the interpreter into English (*v*). The commissioners must also transmit whatever original documents have been produced in evidence before them, as copies of such documents, however authenticated, will not be admissible (*w*); unless, indeed, it be distinctly proved, that the law of the country where the commission was held has prevented the removal of the originals (*x*).

§ 367. Sect. 10 of the English, and § 75 of the Irish statute, further enact, "that no examination or deposition to be taken by virtue of these acts respectively shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity, to attend the trial; in all or any of which cases the examinations and depositions, certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just excep-

(*t*) *Atkins v. Palmer*, 4 B. & A. 380, per Abbott, C. J.

(*u*) *Clay v. Stephenson*, 7 A. & E. 185; 2 N. & P. 189, S. C.

(*v*) *Atkins v. Palmer*, 4 B. & A. 377.

(*w*) *R. v. Douglas*, 1 C. & Kir. 670.

(*x*) *Alivon v. Furnival*, 1 C. M. & R. 277.

tions." It will be seen that, under these statutes, depositions are rendered admissible only in one or other of four events. First, if the opposite party *consent*; secondly, if the witness be proved to be *dead*; thirdly, if he be shown to be *beyond the jurisdiction* of the Court; and lastly, if it appear that, from *permanent sickness* or infirmity, he cannot attend the trial. The judges seem inclined to construe these statutes strictly. Thus, where a witness stated that he had seen the deponent, whose examination had been taken before the master on board a ship bound for Montreal on the day preceding the trial; that he then had his luggage on board; and that the ship in the evening was lying below Gravesend waiting for the captain, Lord Denman held that this was not sufficient (*w*), though, as we have seen, less stringent evidence has satisfied other judges, in cases where the admissibility of the depositions rested on the principles of common law (*x*). So, where in order to put in the deposition of a witness examined under 1 Will. 4, c. 22, the attorney's clerk swore that he had made inquiries for the witness at his residence, and had then been told, by a person whom he believed to be the wife of the witness, that he had sailed in a certain ship, Lord Abinger rejected the testimony as hearsay, observing that the woman who gave the information to the clerk, or some person who knew of his own knowledge that the witness was abroad, should have been called (*y*). This decision was, no doubt, correct with reference to the wording of the act; but we have seen that, at common law, the evidence would have been admissible to prove, not indeed that the witness was abroad, but that inquiries had been made for him, and that he could not be found (*z*).

§ 368. Perhaps, independent of statutory provisions, the Court of Exchequer has a limited power to order, at the instance of the Crown, that witnesses in revenue causes should be examined before an officer of the Court; and the learned barons, in conformity with several old precedents, have recently exercised this power, by permitting the Attorney-General, in an information for penalties, to examine on interrogatories before the Queen's remembrancer a

(*w*) *Carruthers v. Graham*, C. & Marsh. 5.

(*x*) See ante, § 348.

(*y*) *Robinson v. Markis*, 2 M. & Rob. 375.

(*z*) See ante, § 350.

material witness for the Crown, who was sworn to be too ill to attend the trial; but their lordships refused to make it part of the rule, that the examinations so taken should be received in evidence, saying that the question was not one to be disposed of on motion (*a*).

§ 369. However this question may be ultimately determined, it is clear that Courts of Equity have inherent power to grant commissions for the examination of witnesses whether at home or abroad (*b*), provided, in the former case, that the witnesses reside more than twenty miles from London (*c*); and the Courts are further authorised to sustain bills, filed for the purpose of preserving evidence *in perpetuam rei memoriam*, touching any matter which cannot be immediately inquired into by a court of law, or where the testimony of a material witness is likely to be lost by his death or departure from the realm, or by any other cause, before the facts can be judicially investigated (*d*). Previously to the passing of the statutes 1 Will. 4, c. 22, and 3 & 4 Vict. c. 105, which enabled courts of law to issue commissions for themselves, it was often necessary to institute proceedings in Chancery as auxiliary to an action at law; and even now it is occasionally expedient to have recourse to a bill for perpetuating testimony. As the object of this jurisdiction is to prevent litigation by preserving evidence, the equity courts will seldom decline to exercise it (*e*).

§ 370. The Legislature, having felt the advantage of extending the benefits derivable from this mode of proceeding, has lately enacted (*f*), that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate

(*a*) *Att.-Gen. v. Reilly*, 13 M. & W. 676; *Jenkins v. Larwood*, Bunb. 13. In *Att.-Gen. v. Bovet*, 15 M. & W. 69, Parke, B., observed, that the case of *Att.-Gen. v. Reilly* was decided as it was, merely because there would have been no appeal, had the Court decided against the Crown; whereas a decision in favour of the Crown left the question open to be determined by a court of error. See ante, § 363.

(*b*) See *Gresley on Ev.* 69—93; and orders in Chancery E. T. 1845, xciv.—cx., set out post, in Chapter *On Enforcing the Attendance of Witnesses*, in note. See Index, tit. *Commissioner*.

(*d*) *Mitf. Pl.* 62; 1 *Smith's Ch. Pr.* 626.

(*c*) 1 *Smith's Ch. Pr.* 478.

(*e*) *Mitf. Pl.* 172, 173.

(*f*) 5 & 6 Vict. c. 69.

or interest in any property real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to file a bill in Chancery to perpetuate any testimony which may be material for establishing such claim or right; and that all laws, rules, and regulations, not contrary to the provisions of that act, now in force or in use in suits to perpetuate testimony, or respecting depositions taken in such suits, or the punishment of perjury committed in making such depositions, shall be in force, and shall be used and applied to all suits instituted under that act, and in respect to depositions taken on such suits. § 2 enacts, that in all such suits touching any honour, title, dignity, or office, or any other matter in which the Crown may have any estate or interest, the Attorney-General may be made a party defendant; and that in all proceedings, in which the depositions, taken in any such suit wherein the Attorney-General was made a defendant, may be offered in evidence, they shall be admissible, notwithstanding the objection that Her Majesty was not a party to the suit.

§ 371. In entertaining suits to perpetuate testimony, courts of equity will compel the defendant to appear and answer, provided he be shown by the bill to have an interest in contesting the plaintiff's claim in the subject of the proposed evidence (*f*); and the cause being brought to issue, a commission for examining witnesses will be made out, executed, and returned, in the same manner as in other cases, though, no relief being prayed, the suit is never brought to a hearing (*g*). The Court will not, in general, permit the publication of the depositions, except in support of a suit or action, nor then, unless it be proved that the witnesses are dead, or otherwise incapable of attending to be examined (*h*). So, if a witness in imminent danger of death has been examined *de bene esse*, under the authority of the ecclesiastical courts, the deposition cannot be read, unless proof be given that the witness has since died, or is too ill to be again examined at the hearing of the cause (*i*).

(*f*) Mitf. Pl. 63.

(*g*) 1 Smith's Ch. Pr. 628.

(*h*) Id. 629; *Morrison v. Arnold*, 19 Ves. 670.

(*i*) *Wequelin v. Wequelin*, 2 Curt. Ec. R. 263.

§ 372. We have seen, in the last chapter, that if a witness, after being examined on interrogatories, should be called at the trial of a cause, either party, on any subsequent trial respecting the same subject, provided the witness be then incapable of attending, may rely, at his option, either on the deposition, or on the previous *viva voce* testimony (*j*); and it may be here observed, that what such witness orally testified may be proved, either by any person, who will swear from his own memory (*k*), or by notes taken at the time by any person, who will swear to their accuracy (*l*), or perhaps, from the necessity of the case, by the judge's notes (*m*). However, this last mode of proof may be open to objection, as such notes form no part of the record, nor is it the duty of the judge to take them, nor have they the sanction of his oath to their accuracy or completeness (*n*). How far it may be necessary to prove the *precise words* spoken, does not clearly appear. Lord Kenyon mentions a case, where the evidence of a witness was rejected, "as he could not undertake to give the words, but merely to swear to the effect of them" (*o*); and the same precision has, on several occasions, been deemed requisite in America (*p*); but on the other hand, it has been urged, with much force, that to insist upon strict accuracy, goes, in effect, to exclude this sort of evidence altogether, or to admit it only in cases where the particularity and minuteness of the witness's narrative, and the exactness with which he undertakes to repeat every word of the deceased's testimony, ought to excite just doubts of his own honesty, and of the truth of his evidence (*q*).

(*j*) *Tod v. Earl of Winchelsea*, 3 C. & P. 387, per Lord Tenterden, ante, § 293.

(*k*) *Strutt v. Bovington*, 5 Esp. 56, per Lord Ellenborough; *Mayor of Doncaster v. Day*, 3 Taunt. 262; *R. v. Jolliffe*, 4 T. R. 290, per Lord Kenyon.

(*l*) *Mayor of Doncaster v. Day*, 3 Taunt. 262; *Chess v. Chess*, 17 Serg. & R. 409.

(*m*) *Mayor of Doncaster v. Day*, 3 Taunt. 262, per Sir Jas. Mansfield.

(*n*) *Miles v. O'Hara*, 4 Binn. 108; *Foster v. Shaw*, 7 Serg. & R. 156; *Ex parte Learmouth*, 6 Madd. R. 113.

(*o*) *R. v. Jolliffe*, 4 T. R. 290.

(*p*) *U. S. v. Wood*, 3 Wash. 440; *Foster v. Shaw*, 7 Serg. & R. 163; *Wilbur v. Selden*, 6 Cowen, 165; *Com. v. Richards*, 18 Pick. 434.

(*q*) See *Cornell v. Green*, 10 Serg. & R. 14, 16; *Miles v. O'Hara*, 4 Binn. 108; *Caton v. Lenox*, 5 Randolph, 31, 36; *Jackson v. Bailey*, 2 Johns. 17.

§ 373. Perhaps, therefore, on occasions when nothing of importance turns on the precise expressions used, it will still be considered sufficient if the witness can speak with certainty to the substance of what was sworn on the former trial. Even on indictments for perjury it is not necessary to state the entire examination, but only to narrate, with accuracy, the whole of that portion of the evidence which relates to the point on which the perjury is assigned, provided the witness can further swear that he heard the whole examination, and that nothing was subsequently said to qualify the original statement (*r*). Unless he can do this his evidence cannot be received (*s*); and as the same rule must apply to the proof of the testimony of a deceased witness, it follows that if the person who heard him give his evidence can only state what was said on the examination in chief, without also giving the substance of his answers in cross-examination, or, at least, positively swearing that nothing escaped the witness which could vary or qualify the first statement, his evidence will be inadmissible (*t*).

§ 374. It need scarcely be added, that testimony thus offered is open to all the objections which might have been taken, had the witness himself been personally present; and, therefore, where a witness, on being examined upon interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced, that part of the deposition was suppressed at the trial, though it was urged, that as the witness was beyond the jurisdiction of the Court, there were no means of compelling the production of the letter (*u*). "We have no power," said Chief Justice Tindal, "to compel the witness to give any evidence at all; but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence" (*v*). In another case where, in order to show that the defendants had used due diligence to obtain the answer of a party to a bill in Chancery, a witness stated on interrogatories, that, as their agent, he had written to the party; and then went on to describe the contents of

(*r*) *R. v. Rowley*, 1 Moo. C. C. 111; *R. v. Dowlin*, Pea. R. 170.

(*s*) *R. v. Jones*, Pea. R. 38.

(*t*) *Wolf v. Wyeth*, 11 Serg. & R. 149.

(*u*) *Steinkeller v. Newton*, 9 C. & P. 319, per Tindal, C. J.

(*v*) *Id.*

the letter and of the reply, though he produced neither, the Court, while rejecting the answers which stated what the letters contained, admitted such part of the deposition as proved that the witness had written a letter to the party in question; for had the witness been himself present at the trial he might have been examined thus far, with the view of showing that the defendants through him had used some exertion to procure the party's answer (*w*). Again, depositions have been admitted, though the witness on his examination had refreshed his memory with some papers, which he alleged were partly in his handwriting and partly not, but which he refused to allow the commissioners to see upon the ground that they were private memoranda; for, as it was a matter for the discretion of the commissioners, whether they would permit the witness to refer to papers during his examination, the learned judge, at the trial, presumed that they had exercised their discretion with propriety (*x*).

§ 375. Another general rule, which governs the production of secondary evidence, whether of documents or of oral testimony, is, that in the eye of the law there are *no degrees* in the various kinds of such evidence (*y*). If, therefore, a deed be lost, or be in the hands of the adversary, who, after due notice, refuses to produce it, the party, seeking to give evidence of its contents, may at once have recourse to parol testimony, though it be proved that he has in his possession a counterpart, a copy, or an abstract of the document (*z*). So, if it be necessary to prove the former testimony of a deceased witness, any person who heard him examined may be called, though a clerk or a shorthand writer may have taken down his evidence word for word (*a*). This rule, of course, does not mean that the mere memory of a witness, who has read a deed, is entitled to equal weight with an authenticated copy of the same instrument;—for in many cases a jury would properly regard such evidence with distrust, and if it should appear

(*w*) *Tufton v. Whitmore*, 12 A. & E. 370.

(*x*) *Steinkeller v. Newton*, 2 M. & Rob. 372, per Tindal, C. J.

(*y*) *Doe v. Ross*, 7 M. & W. 102; 8 Dowl. 389, S. C.; *Hall v. Ball*, 3 M. & Gr. 242; 3 Scott, N. R. 577, S. C.; *Brown v. Woodman*, 6 C. & P. 206, per Parke, B.; *Jeans v. Wheedon*, 2 M. & Rob. 486, per Cresswell, J. (*z*) Cases cited in last note.

(*a*) See *Jeans v. Wheedon*, 2 M. & Rob. 486, per Cresswell, J.

that more satisfactory proof was intentionally withheld, their distrust might amount to absolute incredulity;—but the rule simply applies to the legal admissibility of the evidence, and is founded on the inconvenience that could not fail to arise in the administration of justice, if the degrees of secondary evidence were strictly marshalled according to their intrinsic weight, and if parties were consequently driven, before they could have recourse to parol testimony, to account for all secondary evidence of superior value, the very existence of which they might have no means of ascertaining.

§ 376. In considering the practical effect of this rule, care must be taken to *exclude from its operation* those cases, in which the law has expressly substituted, in the place of primary proof, some particular species of secondary evidence. Thus, for instance, where the contents of public records and documents are to be proved, examined copies are, on grounds of general convenience, considered admissible (b); and such copies, though in strictness secondary evidence, partake so much of the character of primary proof, that so long as it is possible to produce them, other inferior degrees of secondary evidence cannot be received. (c) Parol testimony therefore can only be admitted, on proof, first, that the public record or document has itself been lost or destroyed, for otherwise an examined copy might be obtained; and secondly, that such copy, if any has been taken, is no longer under the control of the party relying upon less satisfactory evidence (d). In like manner, if a witness has been examined before a magistrate or coroner under such circumstances, that these officers respectively have, in pursuance of their duty, taken down his statement in writing, parol evidence of his examination cannot be given in the event of his death, so long as the deposition itself can be produced; for the law having constituted the deposition as the authentic medium of proof, will not permit the admission of any inferior species of evidence. If, indeed, it can be shown that the deposition is

(b) Ante, § 324, and post, Chapter *On Public Documents*.

(c) *Doe v. Ross*, 7 M. & W. 106, per Lord Abinger.

(d) *Thurston v. Slatford*, 1 Salk. 214, 285; *Macdougall v. Young*, Ry. & M. 392; 1 Ventr. 257.

lost or destroyed, or is in the possession of the opposite party, who after notice refuses to produce it, the statement of a witness who was present at the examination will then be admissible, as will also a copy of the deposition (*e*).

§ 377. It must further be carefully observed, that the rule which includes in one legal category all species of secondary proof, by no means opens a door to all sorts of evidence, however loose, which a party chooses to tender(*f*). A document, therefore, cannot be proved by the production of the copy of a copy (*g*), for such evidence would be rejected on the broad ground that renders hearsay evidence inadmissible. The opponent would have a right to object, that, even assuming that the second copy corresponded exactly with the terms of the first, yet the first must be produced and proved to have been compared with the original, or otherwise there would be nothing to show that the second copy and the original were identical. Such evidence would in fact be but the shadow of a shade.

(*e*) See 2 Russ. C. & M. 895; *R. v. Wylde*, 6 C. & P. 380.

(*f*) *Everingham v. Roundell*, 2 M. & Rob. 138, per Alderson, B. (*g*) *Id.*

CHAPTER VI.

OF EVIDENCE ADDRESSED TO THE SENSES.

§ 378. THE first degree of evidence, and that which, though open to error and misconception, is obviously most satisfactory to the mind, is afforded by our own senses (*a*). “Believe half what you see, and a twentieth part of what you hear,” is a maxim, which reflects severely upon human intelligence and veracity, but is nevertheless founded in the main upon the experience of life, and marks the vast distinction that obtains, between a knowledge of facts derived from actual perception, and the belief of the existence of facts resting on the information of others. In judicial proceedings, the judge or jury can seldom act *entirely* upon evidence of this description, though, when pregnancy is pleaded, a jury of matrons are empowered to decide upon examination of the person of the prisoner (*b*); but in a vast number of instances, especially where the fact in dispute is sought to be proved by circumstantial evidence, the verdict will be found to rest materially upon matters submitted to the ocular inspection of the jury. Thus, if a prisoner be indicted for stealing corn, and one of the circumstances tending to establish his guilt, be his possession of wheat apparently resembling a quantity from which a portion has been recently taken, it is evident that a comparison by the jury of the wheat found upon the prisoner, with a sample of that belonging to the prosecutor, will be more satisfactory, than if its identity be sworn to by a witness who, out of court, has examined the two lots. It is true that the jury may come to an erroneous

(*a*) “*Segnius irritant animos demissa per aurem,
Quam quæ sunt oculis subjecta fidelibus, et quæ
Ipse sibi tradit spectator.*”—*Hon. Ars Poet.* l. 180.

(*b*) *Baynton's case*, 14 How. St. Tr. 630, 631, 634; 1 Hale, 368; 2 id. 413; *R. v. Wycherley*, 8 C. & P. 262. By this last case it appears, that the matrons may, in addition to their personal inspection, hear the evidence of a surgeon, but in that event he must be examined as a witness in open court. See *Countess of Essex's case*, 2 How. St. Tr. 802.

conclusion in such a case; for either the witnesses, who state that the two parcels of wheat produced were respectively taken from the prisoner and the prosecutor, may intentionally or accidentally deceive them, or they may themselves be mistaken in assuming the identity of the grain. Still, both these sources of error will equally exist, in the event of a witness being called to state the result of his previous examination of the two samples. And this last course will be further open to the objection, that such a witness may with little danger tell a fabricated story, since cross-examination as to mere matters of opinion is almost necessarily inconclusive, and consequently the jury run the additional risk of being misled by his fraudulent testimony.

§ 379. These observations apply to all cases, in which the guilt or innocence of a prisoner depends upon the *identity* or *comparison* of two articles found in different places; as, for example, the wadding of a pistol with portions of a torn letter found upon the person of the accused, or the fractured bone of a sheep with mutton found in his house, or fragments of dress with his rent garment, or property damaged with the instrument by which the damage is supposed to have been effected. In all these, and the like cases, it is highly expedient, if possible, to produce to the Court the articles sought to be compared; and although the law, in demanding the production of the best evidence, does not expressly require that this course should be adopted, but permits a witness to testify as to his having made the comparison, without first proving that the articles cannot be produced at the trial, their non-production, when unexplained, may often generate a suspicion of unfairness, and will always furnish an occasion for serious comment. In illustration of this subject, reference may be made to an old case. A boy, having found a diamond, took it to a jeweller who refused to return it to him. An action of trover was brought, and as the jeweller declined to produce the diamond at the trial, the judge directed the jury to presume that it was of the finest water, and they found accordingly (c). So, in the case of *Wood v. Peel* (d), where the point at issue was whether the plaintiff's horse, Running Rein,

(c) *Armory v. Delamirie*, 1 Str. 504; 1 Smith's Lead. C. 151, S. C.

(d) *Ex. Middx. Sittings after T. T.*, 1844, cor. Alderson, B., MS.

who had won the Derby in 1844, was foaled by Mab in 1841, the production of the horse, in order to test the accuracy and credit of the witnesses who had sworn to its identity, was considered so material, that the plaintiff, being unable to comply with an order of the Court to produce it, submitted very prudently to a non-suit, rather than run the almost inevitable risk of a verdict in favour of the defendant.

§ 380. In many cases of this nature it will be advisable, in order to guide the jury to a right decision, that persons conversant with the articles produced should be examined as to their opinion respecting the proof of identity. For instance, if the question be whether two samples of wine be drawn from the same bin, or two pieces of cloth be the produce of the same loom, or two coins be struck in the same die, it is important that a wine merchant, a clothier, or an officer of the Mint (*d*) should respectively be called, in order to furnish the Court with suggestions, founded on practical experience; because, in such inquiries, a jury, composed of persons perhaps but little acquainted with these matters, can scarcely, without some extrinsic aid, be enabled to form a correct judgment respecting them: still even here the articles should be produced, that the jury may test the accuracy of the opinions expressed by the witnesses, and may perceive that the reasons, upon which those opinions are founded, correspond with the actual state and condition of the articles themselves.

§ 381. Though evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions, or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected

(*d*) 2 Will. 4, c. 34, § 17, provides, that, in order to prove coin to be counterfeit, it shall not be necessary to call any moneyer or other officer of the Mint, but that it shall be sufficient to prove that fact by the evidence of any other credible witness.

with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions, which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirist; and many amusing illustrations of its effect might be cited from our best authors. Shakespeare makes Jack Cade's nobility rest on this foundation; for Jack Cade having asserted, that the eldest son of Edmund Mortimer, Earl of March, "was by a beggar woman stolen away," "became a bricklayer when he came to age," and was his father, one of the rioters confirms the story, by saying, "Sir, he made a chimney in my father's house, and the *bricks* are alive at this day to testify it; therefore deny it not" (e). Archbishop Whately, who makes use of the above anecdote in his diverting "Historic Doubts relative to Napoleon Buonaparte," adds, "Truly this evidence is such as countrypeople give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold (f). So, in the interesting story of "The Amber Witch," the poor girl, charged with witchcraft, after complaining that she was the victim of the sheriff, who wished to "do wantonness with her," added, that he had come to her dungeon the night before for that purpose, and had struggled with her, "whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, whereupon he had left her." To this the sheriff replied, "that it was his little lap-dog, called Below, which had scratched him, while he played with it that very morning," and having *produced the dog*, the Court were satisfied with the truth of his explanation (g).

§ 382. Turning once more to matters of graver import, we may observe that in causes, either relating to disputed rights of way, or involving some question which depends on the relative position of places, it is often desirable that the jury should have an opportunity of *viewing the spot* in controversy; since the know-

(e) Sec. Part of Hen. 6, act 4, scene 2.

(f) p. 28, 6th ed.

(g) Amber Witch, translated by Lady Duff Gordon, p. 78—80.

ledge derived by these means is far more satisfactory than what can be obtained by the examination of maps or plans, which are often inaccurate and obscure, and may perhaps have been prepared with an express view to mislead. The Legislature has accordingly provided, that where in any case, either civil or criminal, depending in one of the superior courts, it shall appear proper that some of the jurors should have a view of the place in question, in order to their better understanding the evidence that may be given at the trial, the judges may order that a rule shall be drawn up for such purpose (h). This provision, which is at present *confined to proceedings in the superior courts*, might with great advantage be extended to every court competent to try an indictment, since the practical result of thus enlarging the sphere of its operation would

(h) 6 Geo. 4, c. 50, § 23, which enacts, "that, where in any case either civil or criminal, or on any penal statute, depending in any of the said courts of record at Westminster, or in the counties palatine, or great sessions in Wales, it shall appear to any of the respective Courts, or to any judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case such Court, or any judge thereof in vacation, may order a rule to be drawn up, containing the usual terms, and also requiring, if such Court or judge shall so think fit, the party applying for the view, to deposit in the hands of the undersheriff a sum of money to be named in the rule for payment of the expenses of the view, and commanding special writs of *venire facias*, *distringas*, or *habeas corpora*, to issue, by which the sheriff, or other minister to whom the said writs shall be directed, shall be commanded to have six or more of the jurors named in such writs, or in the panels thereto annexed (who shall be mutually consented to by the parties, or if they cannot agree, shall be nominated by the sheriff or such other minister as aforesaid), at the place in question, some convenient time before the trial, who then and there shall have the place in question shown to them by the persons in the same writs named, to be appointed by the Court or judge; and the said sheriff, or other minister who is to execute any such writ, shall, by a special return upon the same, certify that the view hath been had according to the command of the same, and shall specify the names of the viewers."

Sect. 24 enacts, "that, where a view shall be allowed in any case, those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn, and so many only shall be added to the viewers who shall appear, as shall, after all defaulters and challenges allowed, make up a full jury of twelve." See stat. 11 Geo. 4 & 1 Will. 4, c. 70, § 4, and 1 & 2 Vict. c. 45, §§ 1 and 2, which authorise any single judge of any of the superior courts to transact at chambers or elsewhere, such business as, before the passing of these acts, might have been transacted by a single judge, although the business relates to matters over which the courts have no common jurisdiction.

be to obviate, in a great measure, the necessity which now obtains, of adopting the costly and uncertain course of removing proceedings from the Central Criminal Court, the Crown Courts at the Assizes, and the Sessions, into the Queen's Bench by certiorari, whenever it is essential to the ends of justice that a view should be granted. It also deserves consideration, whether it be not expedient to empower every presiding judge to order a view, even after the evidence has been heard, in all cases, wherein the result of the issue is found to depend upon the position of places, which are not satisfactorily defined at the trial.

CHAPTER VII.

OF HEARSAY.

§ 383. As evidence afforded by our own senses is seldom attainable in judicial trials, the law is satisfied with requiring the next best evidence, namely, the testimony of those who can speak from their own personal knowledge. It is not requisite that the witness should have personal knowledge of the main fact in controversy; for this may not be proveable by direct testimony, but only by inference from other facts shown to exist. But it is requisite, that, whatever facts the witness may speak to, he should be confined to those lying within his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be. For it is deemed indispensable to the proper administration of justice,—first, that every witness should give his testimony under the sanction of an oath, or, its equivalent, a solemn affirmation,—and, secondly, that he should be subject to the ordeal of a cross-examination by the party against whom he is called, so that it may appear, if necessary, what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony from the relation of third persons, even where the informant is known, cannot be subjected to these tests; for as Mr. Justice Buller observes, “If the first speech were without oath, another oath that there was such speech, makes it no more than a mere speaking, and so of no value in a court of justice”^(a); besides, it is often impossible to ascertain through whom, or how many persons, the narrative has been transmitted, from the original witness of the fact. It is this, which constitutes that sort of second-hand evidence, termed hearsay; a species of proof which,

(a) B. N. P. 294, b.

with a few exceptions that will be presently noticed, cannot be received in judicial investigations (*b*).

§ 384. So strict is this rule of exclusion, which has been recognised as a fundamental principle of the law of evidence ever since the time of Charles the Second (*c*), that it even applies where, if the declaration be rejected, no other evidence can possibly be obtained; as, for example, if it purports to be the declaration of the only eye-witness of the transaction, and he is since dead (*d*). So, it has several times been held, where prisoners have been indicted for ravishing children, who were too young to comprehend the nature of an oath, that statements made by the children to their mothers shortly after the offence was committed, could not be received in evidence (*e*). So, also, a declaration, though made on oath, and in the course of a judicial proceeding, cannot be received, if the *litigating parties are not the*

(*b*) The rule excluding hearsay evidence, or rather the mode in which that rule is frequently misunderstood in courts of justice, is amusingly caricatured by Mr. Dickens in his report of the case of *Bardell v. Pickwick*, p. 367:—

“‘I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up if you please, Mr. Weller.’

“‘I mean to speak up, sir,’ replied Sam. ‘I am in the service o’ that ’ere gen’l’mán, and very good service it is.’

“‘Little to do, and plenty to get, I suppose!’ said Serjeant Buzfuz, with jocularity.

“‘Oh quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes,’ replied Sam.

“‘You *must not tell us what the soldier*, or any other man, *said*, sir,’ interposed the judge, ‘*it’s not evidence*.’

“‘Wery good, my Lord,’ replied Sam.”

(*c*) One of the earliest cases in which the rule was acted upon, is *Sampson v. Yardley*, 2 Keb. 223, Pl. 74, 19 Car. 2.

(*d*) 1 Ph. Ev. 209. In Scotland the rule is otherwise; evidence on the relation of others being admitted, where the relator is since dead, and would, if living, have been a competent witness. And if the relation has been handed down to the witness at second hand, and through several successive relators, each only stating what he received from the intermediate relator, it is still admissible, if the original and intermediate relators are all dead, and would have been competent witnesses if living.—*Tait*, Ev. 430, 431. But the reason for receiving hearsay evidence in cases where, as is often the case in Scotland, the judges determine upon the facts in dispute, as well as upon the law, is stated and vindicated by Sir James Mansfield, in the *Berkeley Peerage* case, 4 Camp. 415. It is observable, that, according to the practice of the English courts, hearsay evidence is often admitted and acted upon in affidavits, which are submitted to the judges only.

(*e*) *R. v. Brasier*, 1 Lea. 199; 1 East, P. C. 443, S. C.; *R. v. Nicholas*, 2 C. & Kir. 246, per Pollock, C. B.

same ; because, in such case, the party against whom the evidence is offered, has had no opportunity of cross-examining the declarant. Thus, the deposition of a pauper, as to the place of his settlement, taken *ex parte* before a magistrate, will be rejected, though the pauper himself has since absconded or died (e). Even the *declarations of a deceased subscribing witness* to a deed or will, in *disparagement* of the evidence afforded by his signature, will be excluded. In the case of *Stobart v. Dryden* (f), the admissibility of such declarations was strenuously urged on two grounds ; first, that as the party offering the deed used the declaration of the witness, evidenced by his signature, to prove the execution, the other party might well be permitted to use any other declaration of the same witness, to disprove it ; and, secondly, that such declaration was in the nature of a substitute for the loss of the benefit of a cross-examination of the subscribing witness ; by which either the fact confessed would have been proved, or the witness might have been contradicted, and his credit impeached. Both these grounds were overruled by the Court of Exchequer ; the first, because the evidence of the handwriting, in the attestation, is not used as a declaration by the witness, but is offered merely to show the fact, that he put his name there, in the manner in which attestations are usually placed to genuine signatures ; and the second, chiefly because of the mischiefs which would ensue, if the general rule excluding hearsay were thus broken in upon. For the security of solemn instruments would thereby become much impaired, and the rights of parties under them would be liable to be affected at remote periods by loose declarations of the attesting witnesses, which could neither be explained, nor contradicted, by the testimony of the witnesses themselves. In admitting such declarations, too, there would be no reciprocity ; for although the party impeaching the instrument would thereby have an equivalent for the loss of his power of cross-examination of the living witness, the other party would have none for the loss of his power of re-examination.

(e) *R. v. Nuneham Courtney*, 1 East, 373 ; *R. v. Ferry Frystone*, 2 East, 54 ; *R. v. Abergwilly*, id. 63 ; *Mima Queen v. Hepburn*, 7 Cranch, 296. This rule does not apply to soldiers and marines ; see *ante*, § 358.

(f) 1 M. & W. 616, 623, 624, 627.

§ 385. The term *hearsay* is used with reference to what is *done* or *written*, as well as to what is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but rests also, in part, on the veracity and competence of some other person (*g*). That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that it supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness (*h*), its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practised with impunity under its cover, combine to support the rule that hearsay evidence is inadmissible (*i*).

§ 386. It cannot, however, be denied, that the rule excluding hearsay evidence, though, in general, admirably calculated for trials before popular tribunals, may, in many instances, work considerable injustice. For example, on a question respecting the competency of a testator, the conduct of his family or relations taking the same precautions in his absence as if he were a lunatic; or his election in his absence to some high and responsible office; or the conduct of a physician who permitted him to execute a will; all these are, with reference to the matter in issue, mere instances of hearsay evidence, mere statements expressed in the language of conduct instead of the language of words, and are therefore inadmissible in a court of justice, although, in the ordinary transactions of life, they would deservedly be considered as cogent moral evidence (*j*). So, on a question of seaworthiness, the conduct of a deceased captain, who, after examining every part of the vessel, embarked in it with his family,—or, on a question respecting the

(*g*) 1 Ph. Ev. 185.

(*h*) "Pluris est oculatus testis unus, quam auriti decem;
Qui audiunt, audita dicunt, qui vident planè sciunt."

PLAUT. *Trucu.* Act 2, sc. 6, l. 8, 9.

(*i*) Per Marshall C. J., in *Mima Queen v. Hepburn*, 7 Cranch, 290, 295, 296; *Davis v. Wood*, 1 Wheat. 6, 8; *R. v. Eriswell*, 3 T. R. 707.

(*j*) *Wright v. Doe d. Tatham*, 7 A. & E. 388, per Parke, B.; 4 Bing. N. C. 547, per Vaughan, J.

loss of insured property, the payment by other underwriters on the same policy (*j*),—cannot be received. On the same ground the fact that, after the issuing of a fiat, certain creditors of the bankrupt returned to his assignees goods which they had received from the bankrupt before he delivered other goods to the defendant, was, in an action of trover brought by the assignees, held inadmissible, as proof that an act of bankruptcy had been committed prior to the time when the goods came into the hands of the defendant (*k*); and, not to multiply instances, where a servant was indicted for perjury, in saying that her deceased mistress had never had a child, declarations of the mistress were rejected as evidence for the Crown (*l*), although, in an action of ejectment, where the same question was in issue, and the words charged as perjury were uttered, such evidence was admitted, as relating to a matter of pedigree (*m*).

§ 387. In most of the instances given above, as illustrating the occasional inconvenience of the rule, the evidence rejected amounted to something more than the mere declarations of parties not examined on oath, nor subjected to cross-examination; for these *declarations were accompanied by acts* done in confirmation of their sincerity, and as such, the evidence was, morally speaking, entitled to great weight. The law, however, will not on this account allow any exception to be made in favour of hearsay; for although, if an act done be evidence per se, any declarations accompanying that act are, as we shall presently see, admissible for the purpose of illustrating, qualifying, or completing it; yet if the act be in its own nature irrelevant to the issue, and the declaration be inadmissible, the union of the two cannot render them evidence (*n*). This question was much discussed in the great case of *Doe d. Tatham v. Wright* (*o*), where the title to the property in dispute depended upon the competency of Mr. Marsden to make a will. The cause was tried four times, and as often debated

(*j*) 7 A. & E. 387, 368. (*k*) *Backhouse v. Jones*, 6 Bing. N. C. 65; 8 Scott, 146, S. C.

(*l*) *Heath's case*, 18 How. St. Tr. 68, 76.

(*m*) *Annesley v. E. of Anglesea*, 17 How. St. Tr. 1175, 1188.

(*n*) 7 A. & E. 361; 4 Bing. N. C. 498.

(*o*) See 2 Russ. & Myl. 1; 1 A. & E. 3; 3 N. & M. 200; 7 A. & E. 313; 6 N. & M. 132; 4 Bing. N. C. 489, S. C.

in the superior courts, till at length in the House of Lords it was decided by all the judges, that letters addressed to a person, whose sanity is the fact in question, unless connected in evidence with some act done by him in relation thereto, are inadmissible to show that he was sane, though the writers were since dead, and the party addressed was treated in the letters as an intelligent man. A great majority of the learned judges also held upon that occasion, that the mere fact of finding such letters, many years after they were written, with the seals broken, in company with other papers bearing indorsements in the testator's handwriting, in a cupboard under his book-case in his private room, was insufficient to raise an inference that they had been read, understood, or acted upon by him; since, although letters, found in such a situation, would no doubt be evidence against a party criminally accused or civilly charged, because, on the tacit supposition that he was a man of sound mind, it would be presumed that he was cognisant of their contents (*p*); yet to make such a supposition, where the capacity of the party was the matter in controversy, would be to argue in a circle. The reasoning, in fact, would proceed thus:—because the testator had sufficient ability to transact business, therefore the inference arises, that he read and understood the letters; and because he read and understood the letters, therefore the inference arises that he had sufficient ability to transact business (*q*).

§ 388. Had the testator, in the case just put, indorsed these letters himself, or could any direct and positive evidence have been given to show that he had, whether by act, speech, or writing, manifested a

(*p*) See 7 A. & E. 369, per Gurney, B.; id. 376, per Bosanquet, J.; 4 Bing. N. C. 531, per Alderson, B.

(*q*) See 7 A. & E. 391, per Parke, B.; 4 Bing. N. C. 545, per id.; id. 531, per Alderson, B.; id. 502, 504, per Coleridge, J.; id. 525, 526, per Patteson, J. The letters rejected in this case were three. 1st. A letter of gratitude to the testator from a clergyman to whom he had formerly given preferment; 2nd. A letter of friendship from a relative, with whom the testator was proved to have corresponded three years afterwards; 3rd. A letter advising the testator to direct his attorney to take steps in a transaction with a certain parish. This letter was indorsed by the attorney, who was long since deceased. Three of the judges considered that all the letters were admissible, six thought that the last was. The remaining judges, including Lord Brougham, Lord Lyndhurst, and Lord Cottenham, held that all the letters were alike inadmissible.

knowledge of their contents, it is clear that the letters could not have been rejected, or in any way withdrawn from the consideration of the jury; for, although they would then have been admitted solely on the technical ground that they explained and illustrated his conduct, no rule of law could have prevented them from operating with full effect upon the minds of the jury, as showing the unbiassed opinions of the writers, and in what manner the testator had been treated by them (*r*).

§ 389. The ecclesiastical tribunals have hitherto adopted a different rule from that established by the case of *Doe d. Tatham v. Wright* in the common law courts; and, in questions respecting the mental capacity of a testator, they appear to have admitted, as evidence of *treatment*, letters written to him by his friends, without proof of any recognition on his part (*s*),—and, as evidence of *opinion*, letters written by his relatives even to other parties (*t*). It may be a subject of rational regret that, in the same country, the substantial rules of evidence should vary in different tribunals; but it must be remembered, that the spiritual courts are constituted upon principles very different from those which regulate the courts at common law, and that some greater laxity may reasonably be permitted, where a judge of known experience and intellect adjudicates both on the law and the fact, than where the weight of testimony is exclusively submitted to jurors, who, in common with the class of persons from which they are selected, are generally but little inclined to discriminate between the sources whence evidence is derived, and are disposed to give to hearsay a value which in reality it does not deserve (*u*).

§ 390. In considering this branch of the law of evidence, care must be taken to *distinguish* clearly between *hearsay evidence* and that which is deemed *original*. For it does not follow, that, because the writings or words in question are those of a third person, not

(*r*) 7 A. & E. 325, per Lord Denman; 4 Bing. N. C. 500, per Coleridge, J.; id. 530, per Alderson, B.; id. 510, per Williams, J.; id. 567, per Tindal, C. J.

(*s*) *Morgan v. Boys*, per Sir Herbert Jenner, cited 7 A. & E. 337; *Handley v. Jones*, cited id.; *Waters v. Howlett*, per Sir John Nicholl, cited 1 A. & E. 8.

(*t*) *Wheeler v. Alderson*, 3 Hagg. Ec. R. 574, 609, per Sir John Nicholl.

(*u*) Ante, § 314, ad fin.

under oath, they are therefore to be considered as hearsay. On the contrary, it often happens, that the very fact in controversy is, whether certain things were written, or spoken, and *not* whether they were *true*; and at other times, the oral or written statements tendered in evidence may prove to be the natural or inseparable concomitants of the principal fact in controversy (*v*). In either of these cases it is obvious, that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue. Thus, if the question be whether a party has acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence. This is often illustrated in actions for malicious prosecution (*w*), or libel (*x*); as also in cases of agency and of trusts. For example, in an action for malicious prosecution, the plaintiff, in order to show that the magistrate's leniency in admitting him to bail had been occasioned, not by the intercession of the defendant, but by the receipt of a letter said to have come from a judge, tendered such letter in evidence, and it was held to be admissible, without proof that it was written by the judge's authority; and, in the same case, an affidavit, sworn by a clerk of the prosecutor's attorney, which stated that means had been taken on the part of the prosecutor to prevent a person from becoming bail for the plaintiff, was likewise admitted as original evidence, without the clerk's being called to prove by whose instructions he had made the affidavit (*y*). So, the *replies* given to inquiries made at the residence, either of an absent witness, or of a bankrupt, denying that he was at home, are original evidence, without examining the persons to whom the inquiries were addressed; because the testimony of the parties inquiring is sufficient to establish the denial, which is the only material fact (*z*).

(*v*) *Bartlett v. Delprat*, 4 Mass. 702, 708; *Du Bost v. Beresford*, 2 Camp. 512.

(*w*) *Ravenga v. Mackintosh*, 2 B. & C. 693.

(*x*) *Coleman v. Southwick*, 9 Johns. 45.

(*y*) *Taylor v. Willana*, 2 B. & Ad. 845.

(*z*) *Crosby v. Percy*, 1 Taunt. 364; *Key v. Shaw*, 8 Bing. 320; *Morgan v. Morgan*, 9 id. 359; *Sumner v. Williams*, 5 Mass. 444; *Pelletreau v. Jackson*, 11 Wend. 110, 123, 124; *Phelps v. Foot*, 1 Conn. 387. Where it is necessary to show, not only that diligent search has been made for the witness, but that he is actually absent, such evidence is not admissible. See ante, §§ 350, 367.

§ 391. Not only does this doctrine apply, whenever the fact that a certain communication was made, and not its truth or falsehood, is the point in controversy (a); but it extends also to those cases, where the *truth* of the fact in dispute will be inferred from the *existence* of another fact which is under investigation. Upon these grounds it is considered, that evidence of *general reputation, reputed ownership, public rumour, general character, general notoriety*, and the like, though composed of the speech of third persons not under oath, is original evidence and not hearsay; the immediate subject of inquiry being the concurrence of many voices, which raises a presumption that the fact in which they concur is true (b). Thus, it has frequently been decided that, except in actions for adultery and indictments for bigamy, where strict proof of marriage is required, *general reputation* is admissible to establish the fact of parties being married. In most of the cases, the marriage has been proved by evidence of certain specific facts, such as the parties being received into society as man and wife, being visited by respectable families in the neighbourhood, attending church and public places together, and otherwise demeaning themselves in public, and addressing each other, as persons actually married (c). Still, though some of these circumstances are receivable, as amounting to acts of admission by the parties themselves, those, which are merely evidence of the *treatment* of the parties by third persons, cannot be admissible on any principle that would not equally include the *declarations* of strangers. The acts, like the words, merely show the opinion entertained by persons not called as witnesses; and though it may be said, that what a person does is usually better evidence of his opinion than what he says, yet this is an observation which goes rather to the weight than to the admissibility of the evidence. Accordingly, general evidence of reputation in the neighbourhood, even when unsupported by facts, will be receivable

(a) *Whitehead v. Scott*, 1 M. & Rob. 2; *Shott v. Strealfeld*, id. 8.

(b) *Foulkes v. Sellway*, 3 Esp. 236; *Jones v. Perry*, 2 id. 482; B. N. P. 296, 297; *Oliver v. Bartlett*, 1 B. & B. 269; *Gurr v. Rutton*, Holt, N. P. R. 327.

(c) *Kay v. Duchesse de Vienne*, 3 Camp. 123; *Hervey v. Hervey*, 2 W. Bl. 877; *Birt v. Barlow*, 1 Doug. 174; *Read v. Passer*, 1 Esp. 214; *Leader v. Barry*, id. 353; *Doe v. Fleming*, 4 Bing. 266; *Smith v. Smith*, 1 Phillim. 294; *Ham-mick v. Bronson*, 5 Day, 290, 293; *In re Taylor*, 9 Paige, 611.

in proof of marriage; and in one case it was decided, after verdict, that the uncorroborated statement of a single witness, who did not appear to be related to the parties, or to live near them, or to know them intimately, but who asserted that he had *heard* they were married, was sufficient, *prima facie*, to warrant the jury in finding the marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof (*d*). Upon somewhat similar grounds, it has been held, that, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness might be called to prove that several persons, who were not examined at the trial, had complained to him that they were alarmed at these meetings, and had requested him to send for military assistance (*e*); and, on a question whether a libellous painting was meant to represent a certain individual, the declarations of spectators, while looking at the picture in the exhibition, have been admitted in evidence (*f*).

§ 392. Wherever the *bodily or mental feelings* of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence. And whether they were real, or feigned, is for the jury to determine. Thus, the representations by a *sick person*, of the nature and effects of the *malady* under which he is labouring, are receivable as original evidence, whether they be made to the medical attendant, or to any other person; though the former are naturally entitled to greater weight than the latter, inasmuch as a physician is far more capable than a man unacquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statements (*g*). This doctrine has been carried to such an extent, that, in an action by the husband upon a policy

(*d*) *Evans v. Morgan*, 2 Cr. & Jer. 453.

(*e*) *R. v. Vincent*, 9 C. & P. 275; *Redford v. Birley*, 3 Stark. R. 88—91.

(*f*) *Du Bost v. Beresford*, 2 Camp. 512, per Lord Ellenborough.

(*g*) *Aveson v. Lord Kinnaid*, 6 East, 188; *Gardiner's Peerage Case*, p. 79, per Copley, Att.-Gen.; *Grey v. Young*, 4 M'Cord, 31; *Gilchrist v. Bale*, 8 Watts, 355.

of insurance on the life of his wife, where the question related to the state of her health at the time when the policy was effected, a witness for the defendants was allowed to state the result of a conversation she had had with the deceased, shortly after the surgeon who was consulted in effecting the insurance had given a certificate of her health, in which conversation the deceased had expressed an apprehension that she should only live a few days, and had added that she had not been well from a time preceding her being examined by the surgeon. The Court held that the conversation was admissible, notwithstanding the general rule which excludes the declaration of a wife as against her husband; and the more especially so, as the surgeon had been first called by the plaintiff, and had admitted that he had formed his opinion respecting her health, principally from the satisfactory answers she had given to his inquiries (*h*).

§ 393. So, on a trial for murder by poisoning, statements made by the deceased in conversation shortly before he took the poison, have been received in evidence for the purpose of proving the state of his health at that time (*i*); and, on the same ground, it has frequently been held, in actions or indictments for assault, that what a man has said about himself to his surgeon was evidence to show what he suffered by reason of the assault (*j*). So, on an indictment for highway robbery, the fact that the prosecutor, a few hours after the attack made upon him, complained to a constable that he had been robbed, will, perhaps, be admissible; though the witness cannot be farther asked whether, on making the complaint, the prosecutor mentioned the name of the prisoner (*k*). It would seem, also, that, in prosecutions for rape, proof that the woman, shortly after the injury, complained that a dreadful outrage had been perpetrated upon her, would, in the event of her death, be receivable as independent evidence (*l*); and if the prosecutrix were called

(*h*) *Aveson v. Lord Kinnaid*, 6 East, 188.

(*i*) *R. v. Johnson*, 2 C. & Kir. 354, per Alderson, B.

(*j*) *Aveson v. Lord Kinnaid*, 6 East, 198, per Lawrence, J.; *R. v. Guttridge*, 9 C. & P. 472, per Parke, B.

(*k*) *R. v. Wink*, 6 C. & P. 397; commented upon by Cresswell, J., in *R. v. Osborne, C. & Marsh*. 624.

(*l*) *R. v. Megson*, 9 C. & P. 420, per Rolfe, B.; *R. v. Osborne, C. & Marsh*.

as a witness, such complaints would *à fortiori* be admissible as tending to confirm her credit (*m*). In no case, however, can the *particulars* of the complaint be disclosed by witnesses for the Crown, either as original, or as confirmatory evidence, but the details of the statement can only be elicited by the prisoner's counsel on cross-examination (*n*). It is difficult to see upon what principle this rule is founded, where the complaint is offered as confirmatory evidence; because, if witnesses were permitted to relate all that the prosecutrix had said in making her original complaint, such evidence would furnish the best test of the accuracy of her recollection, when she was sworn to describe the same circumstances at the trial (*o*).

§ 394. Again, in actions for criminal conversation, if it be material, with the view of increasing or diminishing the damages, to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence (*p*). But to guard against the abuse of this rule, it must be proved by some evidence independent of the date appearing on the face of the letters (*q*), that they were written by the wife to the husband prior

624, per Cresswell, J. In *R. v. Guttridge*, 9 C. & P. 471, where a prosecutrix for a rape was absent from the trial, Parke, B., rejected proof of her complaint, apparently on the ground that it was only confirmatory evidence.

(*m*) *R. v. Megson*, 9 C. & P. 420; *R. v. Clarke*, 2 Stark. R. 241; 1 East, P.C. 444, 445; 1 Hale, 633.

(*n*) *R. v. Walker*, 2 M. & Rob. 212, per Parke, B.; *R. v. Osborne*, C. & Marsh. 622; *R. v. Quigley*, Ir. Cir. R. 677, per Torrens, J.

(*o*) See *R. v. Walker*, 2 M. & Rob. 212.

(*p*) *Trelawney v. Coleman*, 2 Stark. R. 191; 1 B. & A. 90, S. C.; *Willis v. Bernard*, 8 Bing. 376; *Winter v. Wroot*, 1 M. & Rob. 404, per Lord Lyndhurst; *Gilchrist v. Bale*, 8 Watts, 355.

(*q*) *Trelawney v. Coleman*, 2 Stark. R. 193, per Holroyd, J.; *Houliston v. Smyth*, 2 C. & P. 24, per Best, C. J. This last case was an action for board and lodging supplied to a wife, while living separate from her husband, in consequence of his cruelty; and letters, purporting to be written by the wife, were tendered by the husband to rebut this charge, but were rejected, on the ground that no proof was given, beyond their date, of the time when they were sent. See ante, § 110, where this exception to the general presumption respecting dates is accidentally omitted.

to any suspicion of misconduct on her part, and when, consequently, no grounds existed for imputing collusion (*o*). It is not, however, necessary, in the absence of other suspicious circumstances, to explain the cause of the husband and wife living apart at the time when the letters were written (*p*), though, of course, it is expedient that such explanation should, if possible, be given.

§ 395. There are *other declarations and acts*, which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. These surrounding circumstances may always be shown to the jury along with the principal fact, provided they constitute parts of what are termed the *res gestæ*; and whether they do so or not must in each particular case be determined by the judge in the exercise of his sound discretion, according to the degree of relationship which they bear to that fact (*q*). Thus, on the trial of Lord George Gordon for treason, the cry of the mob, who accompanied the prisoner on his enterprise, was received in evidence, as forming part of the *res gestæ*, and showing the character of the principal fact (*r*). So, on an indictment for manslaughter, a statement, made by the deceased immediately after he was knocked down, as to how the accident happened, has been held admissible (*s*); and similar evidence has been received by Lord Holt, in an action brought by a husband and wife against a defendant for wounding the wife (*t*). So, also, where a person enters upon land in order to

(*o*) *Edwards v. Crock*, 4 Esp. 39, per Lord Kenyon; *Trelawney v. Coleman*, 1 B. & A. 90; *Wilton v. Webster*, 7 C. & P. 198, per Coleridge, J.

(*p*) *Trelawney v. Coleman*, 2 Stark. R. 191; 1 B. & A. 90, S. C.

(*q*) Per Park, J., in *Rawson v. Haigh*, 2 Bing. 104; *Ridley v. Gyde*, 9 Bing. 349, 352; *Pool v. Bridges*, 4 Pick. 379; *Allen v. Duncan*, 11 Pick. 309.

(*r*) 21 How. St. Tr. 514, 529.

(*s*) *R. v. Foster*, 6 C. & P. 325, per Park and Patteson, Js., and Gurney, B.

(*t*) *Thompson v. Trevanion*, Skin. 402.

take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin (*u*), or the like; or changes his actual residence, or domicile, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself; or, in fine, does any other act, material to be understood; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts (*v*). So, upon an inquiry as to the state of mind, sentiments, or dispositions of a person at any particular period, his contemporaneous declarations are admissible as parts of the *res gestæ* (*w*). Again, in a suit for enticing away a servant, his statement at the time of leaving his master will be received, as tending to show the motive of his departure (*x*); and where an action of trover was brought against the assignees of a bankrupt, and it appeared that the plaintiff, at the recommendation of the bankrupt, had sent some goods to a dyer, and had told him that the bankrupt would call and give directions about them, it was held that these directions should have been submitted to the jury on behalf of the assignees, as affording some evidence of a dealing with the goods, if not of the consent of the true owner to such dealing (*y*).

§ 396. So extensive is this rule in its operation, that to a certain degree it even overrides the general provision of law, which precludes a party's declarations from being evidence for himself; and therefore, in an action for falsely representing the solvency of a stranger, whereby the plaintiffs were induced to trust him with goods, statements by them at the time when the goods were sup-

(*u*) Co. Lit. 49 b, 245 b; Robinson v. Swett, 3 Greenl. 316; 3 Bl. Com. 174, 175.

(*v*) Bateman v. Bailey, 5 T. R. 512, and the observations of Mr. Evans upon it, in 2 Poth. Obl. App. No. xvi., § 11; Rawson v. Haigh, 2 Bing. 99; 9 Moore, 217, S. C.; Vacher v. Cocks, M. & M. 353, per Lord Tenterden; Smith v. Cramer, 1 Bing. N. C. 585; Doe v. Arkwright, 5 C. & P. 575, per Parke, B.; Gorham v. Canton, 5 Greenl. 266; Thorndike v. City of Boston, 1 Metc. 242.

(*w*) Barthelemy v. The People, &c., 2 Hill, N. Y. Rep. 248, 257.

(*x*) Hadley v. Carter, 8 N. Hamps. 40.

(*y*) Sharp v. Newsholme, 5 Bing. N. C. 713.

plied, that they trusted him in consequence of the representation, were received as evidence on their behalf (*z*); and where a bailee was sued for loss by negligence, his declarations, contemporaneous with the loss, have been held in America to be admissible in his favour, as tending to show the nature of the loss (*a*). In Lord George Gordon's trial, his counsel strove to carry this doctrine one step further; and witnesses having been called by the Crown to speak to a meeting that was held on the 29th of May, and to what fell from the defendant on that occasion, one of them was asked on cross-examination, what Lord George had said relative to the meeting on the preceding night, the object being to show thereby that the defendant's motives in convening and attending it were not criminal. The Court, however, held, that though the witness might be questioned as to the whole conversation that passed at the meeting, the private declaration of the defendant, whether subsequent or precedent to that meeting, could not be given in evidence as explanatory of his intentions or conduct (*b*).

§ 397. In the practical application of this rule, two points deserve an especial attention. The first is that declarations, though admissible as evidence of the declarant's *knowledge* or *belief* of the facts to which they relate, and of his *intentions* respecting them, are *no proof* of the *facts* themselves; and therefore, if it be necessary to show the existence of such facts, proof aliunde must be laid before the jury; and it seems that, in strict practice, this proof should be given in the first instance, before the Court be called upon to receive evidence of the declarations. For instance, the fact of insolvency must be established, before statements of the insolvent will be admitted to show that he was aware of his embarrassed circumstances (*c*). Sometimes, under the law relating to bankrupts, the truth of the facts need not be proved, but it will suffice to show the bankrupt's belief. Thus, if the act of bankruptcy relied upon be an absconding with intent to delay

(*z*) *Fellowes v. Williamson*, M. & M. 306, per Lord Tenterden.

(*a*) Story on Bailm. § 239; citing *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Beardslee v. Richardson*, 11 Wend. 25. (*b*) 21 How. St. Tr. 542, 543.

(*c*) *Thomas v. Connell*, 4 M. & W. 267, 269, 270; *Craven v. Halliley*, cited *id.* 270, per Parke, B.; *Vacher v. Cocks*, M. & M. 353.

creditors, a declaration by the bankrupt that he left home to avoid a writ will be admissible, though no evidence be given that any writ was actually out against him, because, in order to constitute this act of bankruptcy, neither writ nor pressure is in fact necessary (*d*). Still, even in this case, the departure from home is a substantive act which must be proved by evidence independent of the declaration; and being an act in itself equivocal, the statement of the bankrupt made during its continuance is admissible to show the intention with which it was done (*e*).

§ 398. The second point deserving consideration is, that, although acts, by whomsoever done, are *res gestæ*, if relevant to the matter in issue (*f*), yet if they be *irrelevant*, declarations qualifying or explaining them will, together with the acts themselves, be rejected. On the non-attention to this rule was founded one of the main fallacies in *Wright v. Doe d. Tatham*. There, on an issue respecting the sanity of a testator, letters written to him, and found among his papers after his death, were offered in evidence; and it was contended that the writing of a letter was an act done, that the contents of the letter were declarations accompanying that act, and that an opinion, though not evidence per se, was yet evidence when embodied in an act. To this it was answered by Mr. Justice Coltman, that, if the letter was admissible on this ground, it must be either because the act was evidence by itself, or because the opinion was evidence. Where an act done is evidence per se, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act. But where the act is, in its own nature, irrelevant to the issue, and where the declaration per se is inadmissible, there is no case in which it has been held that the union of the two has rendered them admissible (*g*).

§ 400. In all these cases the principal points of attention are

(*d*) *Rouch v. Great Western Rail. Co.*, 1 Q. B. 51, 62, 63; 4 P. & D. 686, S. C.; *Newman v. Stretch, M. & M.* 338, per Parke, J.; *Ex parte Bamford*, 15 Ves. 449; *Robson v. Rolls*, 9 Bing. 648.

(*e*) *Rouch v. Great Western Rail. Co.*, 1 Q. B. 63.

(*f*) *Wright v. Doe d. Tatham*, 7 A. & E. 355, per Parke, B.

(*g*) *Wright v. Doe d. Tatham*, 7 A. & E. 361, ante, § 387.

whether the *circumstances and declarations* offered in proof were *so connected with the main fact* under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. It was at one time thought necessary that they should be *contemporaneous* with it (*h*); but this doctrine has recently been *rejected*, and it seems now to be decided, that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential (*i*). Thus, what a bankrupt said immediately on his return home, as to the place where he had been, and his motive in going, has been held admissible (*j*); and in *Ridley v. Gyde* (*k*), where the disputed act of bankruptcy was a fraudulent transfer, a declaration by the bankrupt, in which he gave a false account of the matter, was received in evidence, though made nearly a month after the transfer had taken place. In that case, the creditor, with whom the conversation was held, had pressed for payment of his debt immediately before the transfer, and had been promised security for the following day; but, instead of keeping his word, the bankrupt had transferred his property to a relative, and had absconded. Under these circumstances the Court, considering that the statement was a mere resumption of the conversation that was had at the first interview, adopted the rule which Mr. Justice Park had laid down in *Rawson v. Haigh* (*l*), "that it is impossible to tie down to time the rule as to the declarations," and that if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*. So, where a trader absented himself from home during the latter half of February

(*h*) This seems still to be the law in America. Thus, in *Enos v. Tuttle*, 3 Conn. R. 250, Hosmer, C. J., observed, that declarations, to become part of the *res gestæ*, "must have been made *at the time of the act done*, which they are supposed to characterise, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonise with them, as obviously to constitute one transaction."

(*i*) *Rouch v. Great Western Rail. Co.*, 1 Q. B. 60, 61; 4 P. & D. 686, S. C.

(*j*) *Bateman v. Bailey*, 5 T. R. 512; recognised by the Court in *Rouch v. Great Western Rail. Co.*, 1 Q. B. 61.

(*k*) *Ridley v. Gyde*, 9 Bing. 349; 2 M. & Scott, 448, S. C. In this case, Gaselee, J. differed from the rest of the Court, but the opinion of the majority was confirmed and recognised in *Rouch v. Great Western Rail. Co.*, 1 Q. B. 61.

(*l*) 2 Bing. 104; 9 Moore, 217, S. C.

and the commencement of March, two letters written by him on the 16th of January, in which he asked for time on some bills of exchange payable in February, were admitted in evidence, as tending to throw light on the cause of his absence (*m*).

§ 401. Still, an act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere *narrative of a past occurrence*, or by an *insulated* conversation held, or an insulated act done, at a later period. Thus, the schedule of an insolvent, delivered four months after his execution of a deed of assignment, cannot be received on behalf of the assignees, as evidence that the indenture was executed with intent to petition (*n*); and where a creditor called upon a bankrupt in the morning, and being told he was out, paid a second visit in the evening of the same day, when the bankrupt made a statement respecting his absence in the morning, Mr. Baron Parke held that this statement was inadmissible, for the purpose of showing that the bankrupt had intentionally denied himself to his creditors, it being too remote in point of time from the absence which it purposed to explain (*o*). It is difficult to reconcile this last case with *Bateman v. Baillie* (*p*), and possibly it would now be considered as laying down the rule somewhat too strictly; but, whatever may be the precise limits of the rule, if any can be assigned, it is perfectly clear that declarations made, or letters written, during absence from home, explanatory of the motive of departure, are admissible as original evidence, since the departure and absence are very properly regarded as one continuing act (*q*).

§ 402. The same principles apply to the *acts* and *declarations* of one of a company of *conspirators*, in regard to the common design, as affecting his fellows. Here a foundation should first be laid by proof, sufficient, in the opinion of the judge, to establish, *prima facie*, the fact of conspiracy between the parties, or, at least, proper

(*m*) *Smith v. Cramer*, 1 Bing. N. C. 585; 1 Scott, 541, S. C.

(*n*) *Peacock v. Harris*, 5 A. & E. 449, 454.

(*o*) *Lees v. Martin*, 1 M. & Rob. 210.

(*p*) 5 T. R. 512. See ante, § 400, n. (*j*).

(*q*) *Rouch v. Great Western Rail. Co.*, 1 Q. B. 51, 61; 4 P. & D. 686, S. C.; *Rawson v. Haigh*, 2 Bing. 99, 104; 9 Moore, 217, S. C.

to be laid before the jury, as tending to establish such fact. The connexion of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them (r).

§ 403. Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this rests in the discretion of the judge, and in seditious or other general conspiracies is seldom permitted, except under particular and urgent circumstances; for, otherwise, the jury might be misled to infer the fact itself of the conspiracy from the declarations of strangers. Still, as a conspiracy need not be established by proof which actually brings the parties together, but may be shown, like any other fact, by circumstantial evidence, the detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession relative to the main design, will occasionally, from necessity, be admitted, as steps to establish the conspiracy itself. On this subject it is difficult to establish a general inflexible rule, but each case must, in some measure, be governed by its own peculiar circumstances (s).

§ 404. It makes no difference at what *time* the party accused is

(r) *R. v. Stone*, 6 T. R. 528, 529; 25 How. St. Tr. 1267, 1277, 1313, S. C.; *American Fur Co. v. U. S.*, 2 Peters, 358, 365; *Growninshield's case*, 10 Pick. 497; *U. S. v. Gooding*, 12 Wheat. 469; *Com. v. Eberle*, 3 Serg. & R. 9. In *R. v. McKenna*, Ir. Cir. Rep. 461, Pennefather, C. J., thus lays down the law. "It is necessary to prove the existence of a conspiracy, and to connect the prisoner with it in the first instance, where you seek to give in evidence against him the declaration of a co-conspirator; and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may, as in any other offence, prove the whole case against him by his own admissions."

(s) See *R. v. Blake*, 6 Q. B. 126.

proved to have entered into the conspiracy or combination ; because every one, who agrees with others to effect a common illegal purpose, is generally considered, in law, as a party to every act, which either had before been done, or may afterwards be done, by the confederates, in furtherance of the common design (*t*). One or two individuals may have concocted the scheme, but all who afterwards join in carrying it out are equally guilty with the originators (*u*) ; at least, if there be any evidence from which their adoption of the previous acts of the association can reasonably be inferred (*v*). Neither does it matter whether the acts were done, or the declarations made, in the *presence* or in the *absence* of the accused, but everything said or done by any one of the conspirators or accomplices in furtherance of the common object, is evidence against each and all the parties concerned, whether they were present or absent, and whether or not they were individually aware of what was taking place (*w*). Thus, the cries of a mob, with whose proceedings the prisoner is connected, though made in his absence, are admissible against him, as explanatory of the objects which he, in common with the multitude, had in view (*x*) ; and expressions used by persons going to a meeting convened by the defendant, are receivable on similar grounds (*y*). In O'Connell's case, where the defendants were charged with summoning monster meetings for illegal purposes, papers publicly sold at these meetings, and supporting the views of the defendants, were received in evidence, though no proof was given connecting the defendants with the persons selling the papers (*z*).

§ 405. Care, however, must be taken to distinguish between such declarations, as are either acts in themselves, which purpose to advance the objects of the criminal enterprise, or as accompany and explain such acts, and those statements, whether written or

(*t*) *R. v. Watson*, 32 How. St. Tr. 7, per Bayley, J.

(*u*) *R. v. Murphy*, 8 C. & P. 311, per Coleridge, J.

(*v*) *R. v. O'Connell*, Arms. & Trev. R. 813, 814, per Pennefather, C. J.

(*w*) *R. v. Brandreth*, 32 How. St. Tr. 857, 858.

(*x*) *R. v. Lord George Gordon*, 21 How. St. Tr. 535, 536 ; cited by Buller, J., in *R. v. Hardy*, 24 How. St. Tr. 452.

(*y*) *R. v. Hunt*, 3 B. & A. 574 ; *Redford v. Birley*, 3 Stark. R. 85—88.

(*z*) *Armst. & Trev. R.* 275—277.

oral, which, although made during the continuance of the plot, are in fact a *mere narrative* of the measures that have already been taken. These last statements are, as before explained (a), inadmissible. The distinction here adverted to may be well illustrated by referring to the case of Hardy, who was prosecuted for high treason. There, a letter, written by a co-conspirator to a private friend unconnected with the plot, which gave an account of the proceedings of a society to which the writer and the defendant were proved to have belonged, and which inclosed several seditious songs stated to have been composed by the writer, and sung by him at a meeting of the society, was rejected, on the ground that it was not a transaction in support of the conspiracy, but merely a relation of the part which the writer had taken in the plot, and, as such, only admissible against himself (b). A second letter was then offered in evidence, which was written by another co-conspirator to a delegate in the country, describing the events that had occurred in London, and exciting and encouraging him thereby to proceed in the criminal business in which he was engaged; and as this was considered by the Court as an act done in furtherance of the plot, the letter was received against the defendant, though there was no evidence to show that it had ever reached the person for whose perusal it was intended (c). The same distinction was drawn by the Court in the case of *R. v. Blake* (d), where the accused was indicted for conspiring with one Tye and others to defraud Her Majesty of certain duties of customs. It appeared at the trial that Blake was a landing waiter, and Tye an agent for importers, at the Custom-house; and it was the duty of these persons respectively to make entries of the contents of cases imported, so as to be a check upon each other. It was shown that on thirteen occasions they had made false entries, in which they stated that certain cases contained smaller quantities than was really the fact. It was then proposed to put in evidence Tye's

(a) *Ante*, § 401.

(b) 24 How. St. Tr. 451—453, per Eyre, C. J., Macdonald, C. B., and Hotham, B.; Buller and Grose, Js., diss. In *R. v. Watson*, 32 How. St. Tr. 352, Lord Ellenborough observed that there was great weight in the arguments of Buller & Grose, Js.

(c) 24 How. St. Tr. 473—477, per Macdonald, C. B., Hotham, B., Buller and Grose, Js.; Eyre, C. J., dubit.

(d) 6 Q. B. 126.

day-book, which contained entries in his handwriting relative to the thirteen transactions, and showed the amount of duty actually paid by him. This book was found in Tye's counting-house, and the Court held that it was clearly admissible, as containing entries made in furtherance of the conspiracy. Tye's cheque-book was next produced, for the purpose of showing by the counterfoil that Blake had received from him part of the monies of which the Customs had been defrauded in these transactions; but the Court rejected this evidence, on the ground that it was no act done in pursuance of the plot, but was a mere statement as to the mode of distributing the plunder, *after* the fraud had been completed. Again, a conversation between two men, apparently *returning from a meeting*, which had been held within an hour before, and about half a mile distant from the spot where the men were, has been rejected, though offered as evidence, not only of the general nature of the meeting, but of the effect that was likely to be produced by the language there employed (*d*). In fine, the declarations of a conspirator or accomplice are receivable against his fellows, only when they are in themselves acts, or when they accompany and explain acts, for which the others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions.

§ 406. On a somewhat similar principle, papers found, after the apprehension of a prisoner, on the person or at the lodgings of a co-conspirator, will be admissible or not against him, according as there is or is not evidence to show that they existed before he was taken into custody. If there be no such evidence the papers will be rejected, as the prisoner cannot be responsible for acts or writings, which possibly may not have existed until after the common enterprise was, so far as he was concerned, at an end (*e*); but if the previous existence of the papers be established, either by direct proof, or by strong presumptive evidence, the objection to their admissibility can no longer prevail (*f*). The question how far

(*d*) R. v. O'Connell, Armst. & Trev. 257—259. See also R. v. Murphy, 8 C. & P. 305; R. v. Watson, 2 Stark. R. 141; 32 How. St. Tr. 349, 351, S. C.

(*e*) R. v. Hardy, 24 How. St. Tr. 718, 731.

(*f*) R. v. Watson, 32 id. 337—342, 347—350; 2 Stark. R. 140, 141, S. C.

unpublished writings upon abstract subjects, which, though of a kindred nature with the crime charged, have no direct relation to it, are admissible in evidence, may admit of some doubt. In the case of Algernon Sidney, a treatise containing speculative republican doctrines, which not only was unpublished, and unconnected with the treasonable practices of which he was accused, but which appeared to have been composed several years before the trial, was, under the auspices of Judge Jefferies, admitted in evidence (*g*); but subsequent times have regarded this trial as a judicial murder, and such proof would assuredly be rejected at the present day. If, indeed, the papers were closely connected with the nature and object of the alleged crime, they would, probably, though unpublished, be considered in strict law as admissible, without any positive proof that they were intended to be used in furtherance of the design; and if such proof could be given, they would doubtless be received (*h*). Where conversations of co-conspirators or accomplices are proved, the effect of the evidence will of course depend upon the surrounding circumstances, such as the fact and degree of the prisoner's attention to what was said, and his approval or disapproval thereof (*i*).

§ 407. The *declarations* of *co-trespassers* in civil actions are governed by the same rules; that is, if several are jointly sued, the declarations of each, which constitute parts of the *res gestæ*, are admissible against all (*j*); while those which amount to mere admissions, or narratives of past events, can only be received against the party making them (*k*). In one case (*l*), which was an action for false imprisonment, Mr. Baron Garrow admitted the declarations of a co-defendant, showing personal malice, as evidence against the other defendants, though made in their absence, and

(*g*) 9 How. St. Tr. 854—859; observed upon by Abbott, J., in *R. v. Watson*, 2 Stark. R. 147; and by Foster, J., in his *Treatise on Crown Law*, 198.

(*h*) *R. v. Watson*, 32 How. St. Tr. 354—361; 2 Stark. R. 141, S. C.

(*i*) *R. v. Hardy*, 24 id. 703, per Eyre, C. J.

(*j*) See *R. v. Hardwick*, 11 East, 585, per Lord Ellenborough; *Powell v. Hodgetts*, 2 C. & P. 432, per Garrow, B.; *North v. Miles*, 1 Camp. 389, per Lord Ellenborough; *Bowsher v. Calley*, id. 391, *n*, per id.; 1 Ph. Ev. 204.

(*k*) *Daniels v. Potter*, M. & M. 501, per Tindal, C. J.

(*l*) *Wright v. Court*, 2 C. & P. 232.

several weeks after the act complained of; but the attention of his lordship does not appear to have been drawn to the *time* when the words were spoken, and probably this case would not now be sanctioned. Where no common object or motive is imputed, as in actions for negligence, the declaration of each defendant is admissible against himself alone (*m*).

§ 408. This doctrine extends to all cases of *partnership*. Wherever any number of persons are associated together in the joint prosecution of a common enterprise or design, as in commercial partnerships, and similar cases, the act or declaration of each member, in furtherance of the common object of the association, is the act or declaration of all. By the very act of association each partner is constituted the agent of the others, for all purposes within the scope of the partnership concern (*n*); unless, under the special circumstances of the case, an intention can be inferred by the jury, that a particular act should not be binding—without the direct concurrence of each individual partner (*o*). While the firm thus created exists, it speaks and acts only by the several members; but when that existence ceases by dissolution, the subsequent acts of the individual members are binding on themselves alone (*p*), except so far as may have been otherwise agreed upon by the articles of association or of dissolution (*q*), or as the acts relate to the previous business of the firm (*r*). This last exception may be illustrated by the case of *Pritchard v. Draper* (*s*), where Lord Brougham held, that the admission of one partner, as to the payment, subsequently to a dissolution, of a debt due to the firm, was admissible against the other partners,—and also by the case of *Goddard v. Ingram* (*t*), where the Court of Queen's Bench decided,

(*m*) *Daniels v. Potter*, M. & M. 503, per Tindal, C. J.

(*n*) *Sandilands v. Marsh*, 2 B. & A. 673, 678, 679; *R. v. Hardwick*, 11 East, 589; *Fox v. Clifton*, 6 Bing. 792; *Nicholls v. Dowding*, 1 Stark. R. 81; *Hodenypl v. Vingerhoed*, Chitty on Bills, 627, n. q.; *Van Reimsdyk v. Kane*, 1 Gall. 630, 635; *Coit v. Tracy*, 8 Conn. R. 268.

(*o*) *Latch v. Wedlake*, 11 A. & E. 959, 965, 966.

(*p*) *Wood v. Braddick*, 1 Taunt. 105, per Sir Jas. Mansfield; *Petherick v. Turner*, cited *id*.

(*q*) *Burton v. Issitt*, 5 B. & A. 267; *Bell v. Morrison*, 1 Peters, 371.

(*r*) *Wood v. Braddick*, 1 Taunt. 104.

(*s*) 1 Russ. & My. 191, 199, 200.

(*t*) 3 Q. B. 839. See *Dowling v. Ford*, 11 M. & W. 329.

that an actual part payment of a partnership debt by one of the members of a dissolved firm, though made in collusion with the creditor, in fraud of the other debtors, in expectation of immediate bankruptcy, and more than six years from the last preceding payment, was sufficient to bar the Statute of Limitations as against the remaining original partners.

§ 409. The mere promise to pay the debt, or the acknowledgment of the debt (*u*), or of part payment (*v*), by one member of a firm, whether made during the partnership, or after the dissolution, will not take the case out of the statute, and revive the remedy against the other members; but this is owing to the salutary operation of Lord Tenterden's Act (*w*), which provides, that "where there shall be two or more joint contractors, or executors or administrators of any contractor," such persons shall not lose the benefit of the statutes of limitation (*x*), "so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them" (*y*). It is true that this act speaks of *joint contractors*, and does not in terms mention *partners*; and consequently here, as in other cases, where the language of the legislature is in the remotest degree doubtful, a distinction has been attempted to be drawn between these two classes of persons, and it has been

(*u*) *Jones v. Ryder*, 4 M. & W. 32; *Hopkins v. Logan*, 5 id. 248, per Parke, B.

(*v*) *Clark v. Alexander*, 8 Scott, N. R. 147, 164; *Willis v. Newham*, 3 Y. & J. 518; *Tippets v. Heane*, 1 C. M. & R. 252; 4 Tyr. 772, S.C.; *Waters v. Tompkins*, 2 C. M. & R. 723; Tyr. & Gr. 137, S.C.; *Waugh v. Cope*, 6 M. & W. 829; *Maghee v. O'Neill*, 7 id. 531; *Eastwood v. Savile*, 9 id. 615; *Bayley v. Ashton*, 12 A. & E. 493; 4 P. & D. 204, S.C.; *Mills v. Fowkes*, 5 Bing. N. C. 465; 7 Scott, 444, S.C.

(*w*) 9 Geo. 4, c. 14, § 1.

(*x*) 21 Jac. 1, c. 16; 10 Car. 1, sess. 2, c. 6.

(*y*) The act further provides, "that nothing therein contained shall alter or take away the effect of any payment of any principal or interest made by any person whatsoever;" and "that, in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

contended that a signature by one of several partners, *using the name of the firm*, is sufficient to take a case out of the statute as to all the partners, in a transaction in which all are interested, inasmuch as a partnership name is the name of each and every member of the firm. In the case where this subtle and forlorn argument was employed, it became unnecessary to decide the question, and the Court, therefore, declined to express an opinion upon it (z); but as a ruling in its favour would manifestly fritter away and neutralize the provisions of a very beneficial enactment, it is presumed that, if the point should again be raised, the Court would not hesitate to negative the validity of the objection.

§ 410. The question has been much discussed, and is still undecided, whether the rule which renders partners in ordinary trading concerns responsible for the acts and declarations of each other, is applicable in its full extent to the case of shareholders in joint-stock companies, where the deed of settlement contains no express regulation on the subject (a).

§ 411. A kindred principle governs in regard to the *declarations of agents*. The principal constitutes the agent as his representative in the transaction of certain business; whatever, therefore, the agent does in the lawful prosecution of that business, is the act of the principal, whom he represents. And "where the acts of the agent will bind the principal, there, his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*" (b). They are of the nature of original evidence and not of hearsay; the representation or statement of the agent, in such cases, being the ultimate fact to be proved, and not an admission of some other fact (c). But, it must be remembered, that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, when ever made, may be given in evidence against him: but the admission or declaration of his agent binds him only when it is made

(z) *Clark v. Alexander*, 8 Scott, N. R. 160, 163.

(a) See *Harrison v. Heathorn*, 6 M. & Gr. 81, 135, 136.

(b) *Story*, Agency, § 134.

(c) 1 Ph. Ev. 381.

during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act and part of the *res gestæ*, that it is admissible at all; and, therefore, it is not necessary to call the agent himself to prove it (*b*); but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act, while he was doing it; and it follows, that where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations, they being mere hearsay (*c*). Thus, what a servant, employed to sell a horse, states respecting it at the time of sale, will bind the master, but his declarations or acknowledgments at any other time, whether made to the purchaser or to a stranger, will not be received (*d*). So, if a letter written by an agent forms the whole or part of an agreement, which by the course of his business he was authorised to make, it will be admissible against the principal; but if it be offered as proof of the contents of a pre-existing contract, or if it contain an account of transactions already performed, it will properly be rejected, though addressed to the principal himself (*e*); unless the principal has replied to it, or otherwise adopted and acted upon it, in which case the agent's letter will be received as explanatory of the principal's conduct (*f*).

§ 412. The law upon this subject has been well explained by Sir William Grant, in the case of *Fairlie v. Hastings* (*g*). "As a

(*b*) *Doe v. Hawkins*, 2 Q. B. 212; *Sauniers v. Wode*, 3 Harrison's R. 299.

(*c*) *Fairlie v. Hastings*, 10 Ves. 123, 126, 127, per Sir Wm. Grant; *Garth v. Howard*, 8 Bing. 451; *Langhorn v. Alnutt*, 4 Taunt. 519, per Gibbs, J.; *Betham v. Benson*, Gow, R. 45, per Dallas, C. J.; *Mortimer v. McCallan*, 6 M. & W. 58, 69, 73; *R. v. Hall*, 8 C. & P. 358, per Littledale, J.; *The Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 336, 337; *Hannay v. Stewart*, 6 Watts, 487, 489; *Stockton v. Demuth*, 8 Watts, 39; *Stewartson v. Watts*, id. 392; *Baring v. Clark*, 19 Pick. 220; *Bank of Monroe v. Field*, 2 Hill, R. 445; *Story, Agency*, § 134—137.

(*d*) *Allen v. Denstone*, 8 C. & P. 760, per Erskine, J.; *Helyear v. Hawke*, 5 Esp. 72, per Lord Ellenborough. See also *Peto v. Hague*, 5 Esp. 134, per Lord Ellenborough.

(*e*) *Fairlie v. Hastings*, 10 Ves. 128; *Langhorn v. Allnutt*, 4 Taunt. 511; *Kahl v. Jansen*, id. 565; *Reyner v. Pearson*, id. 662.

(*f*) *Coates v. Bainbridge*, 5 Bing. 58.

(*g*) 10 Ves. 126, 127.

general proposition," said he, "what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal: or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So, with regard to acts done, the words with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as agent. * * * The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission; and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, respecting his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."

§ 413. As the rule admitting the declarations of the agent is founded upon his legal identity with the principal, these bind only so far as there is authority to make them. When the authority is express, no difficulty can well arise; but questions of much nicety will often occur, where power to make an admission is sought to be inferred by implication from an authority to do a certain act. A few examples may furnish some guide upon this subject. Thus, where a wife is authorised, in her husband's absence, to carry on the business of his shop, her admissions, made on application to pay for goods previously delivered at the shop, will be received in

evidence against the husband (*h*) ; but her acknowledgments of an antecedent contract for the hire of the shop, or her agreement to make a new contract for the future occupation of it, will be rejected, as it cannot be necessary that the wife should have this extensive power of binding her husband, for the mere purpose of conducting the business of the shop (*i*). So, if goods were deposited with a pawnbroker in the ordinary course of his business, a declaration of the shopman that his master had received the goods, would probably be admissible against the master, because it might well be assumed that the shopman was authorised to answer any inquiries respecting the goods, made by persons interested in them ; but if the admission related to a transaction unconnected with the immediate business of the shop, as, for instance, if it referred to the loan of several hundred pounds on a single pledge at five per cent. interest, it would not be received (*j*).

§ 414. We have now seen that there are *three classes of declarations*, which, though usually treated under the head of hearsay, are in truth *original* evidence ; the *first* class consisting of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question ; the *second*, including expressions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry ; and the *third*, embracing all other cases, where the declaration offered in evidence may be regarded as part of the *res gestæ*. All these classes are involved in the principle of the last, and have been separately treated merely for the sake of greater distinctness.

(*h*) Clifford v. Burton, 1 Bing. 199 ; 8 Moore, 16, S.C.

(*i*) Meredith v. Footner, 11 M. & W. 202.

(*j*) Garth v. Howard, 8 Bing. 451.

CHAPTER VIII.

OF MATTERS OF PUBLIC AND GENERAL INTEREST.

§ 415. HAVING thus illustrated the nature of hearsay evidence, shown the reasons on which it is generally excluded, and explained the distinction between such evidence and that which is original, we are next to consider *the cases in which the rule rejecting hearsay has been relaxed*. These cases may be conveniently divided into six classes;—*first*, those relating to matters of public and general interest;—*secondly*, those relating to pedigree;—*thirdly*, those relating to ancient possession;—*fourthly*, declarations against interest;—*fifthly*, declarations in the course of office or business; and *lastly*, dying declarations. It will be observed, that these exceptions, which are allowed only on the ground of the absence of better evidence, and from the nature and necessity of the case, embrace most of the points of inconvenience, that would result from a stern and universal application of the rule, and thus remove the principal objections which have been urged against it. We now propose to discuss the exceptions in their order.

§ 416. And *first*, as to matters of *public and general interest*. The admissibility of hearsay evidence in this class of cases appears to rest mainly on the following grounds:—that the origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; that in matters, in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public, and as the nature of such rights excludes the probability of individual bias, what is dropped in conversation respecting them may be presumed to be true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false; that reputation can hardly exist without the con-

currence of many parties unconnected with each other, who are all alike interested in investigating the subject; that such concurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion that is resorted to as evidence, for it is to this that every member of the community is supposed to be privy, and to contribute his share (*a*).

§ 417. In speaking of matters of public and general interest, the terms public and general are sometimes used as synonymes, meaning merely what concerns a multitude of persons (*b*). But, in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term *public* being strictly applied to that which concerns every member of the state; and the term *general* being confined to a lesser, though still a considerable, portion of the community. This distinction should be carefully attended to, because in matters strictly public, such, for example, as a claim of highway or a right of ferry, reputation from any one appears to be receivable; and although declarations would be almost worthless, unless made by persons who, by living in the neighbourhood, or by frequently using the road or ferry, or the like, are shown to have had some means of knowledge; yet the want of such proof of their connection with the subject in question seems to affect the value only, and not the admissibility, of the evidence. If, however, the right in dispute be simply general; that is, if those only who live in a particular district, or adventure in a particular enterprize, are interested in it, hearsay from persons, wholly unconnected with the place or business, would be, not only of no value, but probably altogether inadmissible (*c*).

(*a*) *Wright v. Doe d. Tatham*, 7 A. & E. 360, 361, per Coltman, J.; S. C. 4 Bing. N. C. 528, per Alderson, B.; *Morewood v. Wood*, 14 East, 329, n., per Lord Kenyon; *Weeks v. Sparke*, 1 M. & Sel. 686, per Lord Ellenborough; *Berkeley Peerage*, 4 Camp. 415, 416, per Sir James Mansfield.

(*b*) *Pim v. Curell*, 6 M. & W. 234.

(*c*) *Crease v. Barrett*, 1 C. M. & R. 929, per Parke, B. By the Roman law, reputation, or common fame, seems to have been admissible in evidence, in all cases; but it was not generally deemed sufficient proof, and, in some cases, not even *semiplena probatio*, unless corroborated; *nisi aliis adminiculis adjuvetur*. Mascardus, De Prob., vol. 1, Concl. 171, n. 1; Concl. 183, n. 2; Concl. 547, n. 19. It was held sufficient, *plena probatio*, wherever, from the nature of the case,

§ 418. Thus, in an action of trespass *quare clausum fregit*, where the defendant pleaded in bar a prescriptive right of common in the locus in quo, and the plaintiff replied, prescribing in right of his messuage to use the same ground for tillage with corn, until the harvest was ended, traversing the defendant's prescription; it appearing that many persons, beside the defendant, had a right of common there, evidence of reputation as to the plaintiff's right was held admissible, provided it were derived from persons conversant with the neighbourhood (*d*). So, where the question was, whether Nottingham Castle was within the hundred of Broxtowe, certain ancient orders, made by the Justices at the Quarter Sessions for the county, in which the castle was described as being within that hundred, were held admissible evidence of reputation; the justices, though not proved to have been residents within the county or hundred, being presumed, from the nature and character of their offices alone, to have had sufficient acquaintance with the subject in dispute, to make the statements in their orders admissible (*e*). Again, where the question related to the custom of mining in a particular district, persons, under whose estates the minerals lay, with respect to which the custom was said to exist, were held to be sufficiently connected with the subject to make

better evidence was not attainable; *ubi à communiter accidentibus, probatio difficilis est, fama plenam solet probationem facere; ut in probatione filiationis*. But Mascardus deems it not sufficient, in cases of pedigree within the memory of man, which he limits to fifty-six years, unless aided by other evidence—*tunc nempe non sufficeret publica vox et fama, sed unà cum ipsâ deberet tractatus et nominatio probari, vel alia adminicula urgentia adhiberi*. Mascard. De Prob. vol. 1, Concl. 411, n. 1, 2, 6, 7.

(*d*) *Weeks v. Sparke*, 1 M. & Sel. 679, 688, 689, per Le Blanc, J. The actual discussion of the subject in the neighbourhood, was a fact also relied on, in the Roman law, in cases of proof by common fame. “Quando testis vult probare aliquem scivisse, non videtur sufficere, quod dicat ille scivit quia erat vicinus; sed debet addere, in vicinis hoc erat cognitum per famam, vel alio modo; et ideò iste, qui erat vicinus, potuit id scire.” J. Menochius, De Præsump. tom. 2, lib. 6, Præs. 24, n. 17, p. 772. See also Mascardus, de Prob. vol. 1, p. 389, 390, Concl. 395, n. 1, 2, 19, 9, where the law is thus laid down:—“Confines probantur per testes. Verum scias velim, testes in hac materiâ, qui vicini, et circum ibi habitant, esse magis idoneos quam alios. Si testes non sentiant commodum vel incommodum immediatum, possint pro suâ communitate deponere. Licet hujusmodi testes sint de universitate, et deponant super confinibus suæ universitatis, probant, dummodum præcipuum ipsi commodum non sentiant, licet inferant commodum in universum.”

(*e*) *Duke of Newcastle v. Broxtowe*, 4 B. & Ad. 273.

their declarations evidence, as they were more likely than others living at a distance to become adventurers, and consequently to be subjected to the operation of the custom (*f*). But where the point at issue was, whether the city of Chester anciently formed part of the County Palatine, an old document, purporting to be a decree of certain law officers and dignitaries of the Crown, not having authority as a court, was held inadmissible as evidence of reputation, because those personages had no peculiar knowledge of the subject, excepting what they derived in the course of that unauthorised proceeding (*g*). Thus it appears that *competent knowledge in the declarant* is, in all cases, an essential pre-requisite to the admission of his testimony; and although all the Queen's subjects are presumed to have that knowledge, in some degree, where the matter is of public concernment, yet, in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required.

§ 419. If the quality of the hearsay itself raises a natural inference that it was derived from persons acquainted with the subject, the Courts will not require independent proof of that fact; and therefore, where the question turned on a manorial custom, depositions, purporting to have been made by copyholders in an ancient suit between a former lord and a person claiming admission to a copyhold, were admitted in evidence without proof that the persons making them were either copyholders, or were otherwise acquainted with the customs of the manor; for the Court assumed that such persons would not have been brought forward as witnesses, had they been ignorant of the subject (*h*). So, an ancient unsigned customary of a manor, which purported to be *ex assensu omnium tenentium*, and which had been handed down with the court rolls from steward to steward, was received as evidence to prove the course of descent within the manor (*i*). But where, in order to

(*f*) *Crease v. Barrett*, 1 C. M. & R. 919, 928—930.

(*g*) *Rogers v. Wood*, 2 B. & Ad. 245, 256, recognised by the Court of Exchequer in *Crease v. Barrett*, 1 C. M. & R. 928, 929. See also *Evans v. Taylor*, 7 A. & E. 617, 626, 627.

(*h*) *Freeman v. Phillipps*, 4 M. & Sel. 486.

(*i*) *Denn v. Spray*, 1 T. R. 466, 473. See also *Chapman v. Cowlan*, 13 East, 10.

prove the boundaries of a manor, an ancient survey was produced from the proper custody, which purported to have been made in the time of Queen Elizabeth by a deputy surveyor appointed by the Crown, and to have been founded on the presentments of certain tenants of the manor, whose names were appended to it, the Court rejected the document, on the ground that no proof had been given that the deputy-surveyor had any authority to institute the inquiry; and stripped of this authority, he not only had no right to make any kind of return, but the presumption that he did make one fell to the ground. The paper might have been written by any clerk idling in the office where it was found, from his own imagination, or compiled, possibly, by some interested person in furtherance of a sinister object of his own (*j*).

§ 420. It may be here expedient to enumerate a few of the principal questions, which have been deemed to involve matters of public or general interest, and to contrast these with some others, which the Courts have considered to be of too private a nature, to allow of their being illustrated by evidence of reputation. Thus, on the one hand, *hearsay has been admitted*, where the question related to a right of common (*k*), a parochial (*l*) or other ^{dist}~~dist~~ modus (*m*), a manorial custom (*n*), a custom of mining in a particular district (*o*), a custom of a corporation to exclude foreigners from trading within a town (*p*), the limits of a town (*q*), the boundary between counties, parishes, hamlets, or manors (*r*), or between *old* and *new* land in a manor (*s*), a claim of tolls on a

(*j*) *Evans v. Taylor*, 7 A. & E. 617, 626, 627.

(*k*) *Weeks v. Sparke*, 1 M. & Sel. 679. See ante, § 418.

(*l*) *Moseley v. Davies*, 11 Price, 162; *White v. Lisle*, 4 Madd. Ch. R. 214, 224, 225; *Short v. Lee*, 2 Jac. & Walk. 464, 473.

(*m*) *Rudd v. Wright*, 1 Ph. Ev. 240.

(*n*) *Doe v. Sisson*, 12 East, 62.

(*o*) *Crease v. Barrett*, 1 C. M. & R. 919, 928—930.

(*p*) *Davies v. Morgan*, 1 C. & Jer. 587, *semble*.

(*q*) *Ireland v. Powell*, cited Pea. Ev. 16, per Chambre, J., and recognised by Williams, J., in *R. v. Bliss*, 7 A. & E. 555.

(*r*) *Nicholls v. Parker*, 14 East, 331, n.; *Brisco v. Lomax*, 8 A. & E. 198; 3 N. & P. 388, S. C.; *Evans v. Rees*, 10 A. & E. 161; 2 P. & D. 627, S. C.; *Plaxton v. Dare*, 10 B. & C. 17; 5 M. & Ry. 1, S. C.; *Thomas v. Jenkins*, 6 A. & E. 525; 1 N. & P. 588, S. C.

(*s*) *Barnes v. Mawson*, 1 M. & Sel. 81.

public road (*t*), the fact whether a road was public or private (*u*), a prescriptive liability to repair sea-walls (*v*), or bridges (*w*), a claim of highway (*x*), a right of ferry (*y*), the fact whether land on a river was a public landing-place or not (*z*), the jurisdiction of a court, and the fact whether it was a court of record or not (*a*), the existence of a manor (*b*), a prescriptive right of toll on all malt brought by the west country barges to London (*c*), a right, by immemorial custom, claimed by the deputy day meters of London, to measure, shovel, unload, and deliver all oysters brought by boat for sale within the limits of the port of London (*d*), a claim by the lord of a manor to all coals lying under a certain district of the manor (*e*), a custom of electing churchwardens by a select committee (*f*), and a prescriptive right to free warren as appurtenant to an entire manor (*g*).

§ 421. On the other hand, evidence of *reputation has been rejected*, where the question was, what usage had obtained in electing a schoolmaster to a grammar school (*h*), whether the sheriff of the county of Chester, or the corporation of the city of Chester, were bound to execute criminals (*i*), whether the lord of a manor had a prescriptive right to all wreck within his manorial boundaries (*j*), whether the plaintiff was exclusive owner of the

(*t*) *Brett v. Beales*, M. & M. 416, 418, per Lord Tenterden.

(*u*) *R. v. Bliss*, 7 A. & E. 555, per Williams, J.

(*v*) *R. v. Leigh*, 10 A. & E. 398, 409, 411.

(*w*) *R. v. Sutton*, 8 A. & E. 516; 3 N. & P. 569, S. C.

(*x*) *Crease v. Barrett*, 1 C. M. & R. 929, per Parke, B.; *Reed v. Jackson*, 1 East, 355. (*y*) *Pim v. Curell*, 6 M. & W. 234.

(*z*) *Drinkwater v. Porter*, 7 C. & P. 181, per Coleridge, J.

(*a*) *Goodtitle v. Dew*, Pea. Add. R. 204.

(*b*) *Steel v. Prickett*, 2 Stark. R. 466, per Abbott, C. J.; *Curzon v. Lomax*, 5 Esp. 60, per Lord Ellenborough.

(*c*) *City of London v. Clerke*, Carth. 181.

(*d*) *Laybourn v. Crisp*, 4 M. & W. 320.

(*e*) *Barnes v. Mawson*, 1 M. & Sel. 77, 81. In that case there was evidence of an uniform exercise of the right.

(*f*) *Berry v. Banner*, Pea. R. 156.

(*g*) *Earl of Carnarvon v. Villebois*, 13 M. & W. 313.

(*h*) *Withnell v. Gartham*, 1 Esp. 324, 325, per Lord Kenyon.

(*i*) *R. v. Antrobus*, 2 A. & E. 793—795.

(*j*) *Talbot v. Lewis*, 1 C. M. & R. 495; 5 Tyrwh. 1, S. C.

soil, or had a right of common only (*k*), whether the land in dispute had been purchased by a former occupier, or was part of an entailed estate of which he had been tenant for life (*l*), what patron formerly had the right of presentation to a living (*m*), whether a *farm* modus existed, and what was its nature (*n*), whether a party had a private right of way over a particular field (*o*), whether the tenants of a particular copyhold estate had the right of cutting and selling wood (*p*), and what were the boundaries between two private estates (*q*). Where, however, it was shown by direct testimony, the admission of which was unopposed, that the boundaries of the farm in question were identical with those of a hamlet, evidence of reputation as to the hamlet boundaries was let in for the purpose of proving those of the farm; for though it was objected that evidence should not be thus indirectly admitted in a dispute between private individuals, the Court overruled the objection, Mr. Justice Coleridge observing, that "he never heard that a fact was not to be proved in the same manner when subsidiary, as when it was the very matter in issue" (*r*).

§ 422. The question, whether evidence of reputation is admissible to prove or disprove a *private prescriptive right* or liability, is involved in some doubt. In the case of *Morewood v. Wood*, where a prescriptive right of digging stones on the lord's waste was claimed by the defendant, as annexed to his estate, and the lord offered evidence of reputation to prove that no such right

(*k*) *Richards v. Bassett*, 10 B. & C. 663, *semble*, per Littledale, J.; *sed qu.*

(*l*) *Doe v. Thomas*, 14 East, 323.

(*m*) Per Lord Kenyon, in *R. v. Eriswell*, 3 T. R. 723, questioning *Bishop of Meath v. Lord Belfield*, 1 Wils. 215.

(*n*) *Wells v. Jesus College*, 7 C. & P. 284, per Alderson, B.; *White v. Lisle*, 4 Madd. Ch. R. 214, 224, 225; *Wright v. Rudd*, cited 1 Ph. Ev. 241, per Lord Lyndhurst. See, however, *Webb v. Petts*, Noy, 44; *Donnison v. Elsley*, 3 Eag. & Y. 1396, n.; and cases cited, 1 Ph. Ev. 241, n. 2.

(*o*) *Semble*, per Dampier, J., in *Weeks v. Sparke*, 1 M. & Sel. 691; and per Lord Kenyon, in *Reed v. Jackson*, 1 East, 357.

(*p*) *Blackett v. Lowes*, 2 M. & Sel. 494, 500, per Lord Ellenborough.

(*q*) *Clothier v. Chapman*, 14 East, 331, n. By the Roman law, evidence of reputation seems to have been deemed admissible, even in matters of private boundary. See *Mascard. de Prob.* vol. 1, p. 391, *Concl.* 396.

(*r*) *Thomas v. Jenkins*, 6 A. & E. 525, 529; 1 N. & P. 588, S. C. See also *Brisco v. Lomax*, 8 A. & E. 198, 213; 3 N. & P. 388, S. C.

existed, the Court of King's Bench were equally divided on its admissibility (s); but since in that case it is difficult to see how the public could have been interested in the matter, unless it had been shown, which it was not, that the rights of the commoners were infringed by the defendant's claim, it is probable that, at the present day, such evidence would be rejected (t). It becomes a more difficult question to determine whether hearsay is admissible, to show a liability in the occupiers of land to repair a road *ratione tenuræ*. Such evidence has been rejected at Nisi Prius in one case (u), though apparently assumed to have been admissible on another occasion (v); and so far, the authorities are pretty equally balanced; but, if it be considered that the fixing an individual with, or the relieving him from, this liability, has a necessary tendency to abridge or increase the liability of the whole neighbourhood,—and, moreover, that the admissibility of evidence of reputation, when tendered to *disprove* a public liability or right, cannot be governed by a different principle from that which prevails, when such evidence is offered to *establish* the liability or right (w),—it may perhaps be considered that the question is one of sufficient general interest, to fall within the exception which admits evidence of reputation (x).

§ 423. The probable *want of competent knowledge* in the declarant is the reason generally assigned for rejecting evidence of reputation or common fame, in matters of mere *private right*. "Evidence of reputation upon general points is receivable," said Lord Kenyon, "because, all mankind being interested therein, it is natural to suppose, that they may be conversant with the subject, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs, or private prescriptions? How is it possible for strangers to know anything of what concerns only private titles?" (y) It may not on

(s) 14 East, 327, n.

(t) See ante, § 418.

(u) R. v. Wavertree, 2 M. & Rob. 353, per Maule, J.

(v) R. v. Cotton, 3 Camp. 444, per Dampier, J.

(w) Drinkwater v. Porter, 7 C. & P. 181, per Coleridge, J.

(x) 2 M. & Rob. 353, 354, n. See also ante, § 418.

(y) Morewood v. Wood, 14 East, 329, n.

all occasions be an easy matter to distinguish between public and private rights, and some few of the cases, cited above in illustration of the subject, may possibly be considered to rest on somewhat doubtful reasoning. Still, the general rule of law cannot be disputed; namely, that if the matter in question be of a public or general nature, that is, if it be interesting to the community at large, or even to a comparatively small portion of the community, such, for example, as the inhabitants of a parish, a town, or a manor, it falls within the exception by which evidence of reputation is admitted; whereas, if it have no connection with the exercise of any public right, or the discharge of any public duty, or with any other subject of general interest, it falls within the ordinary rule by which hearsay evidence is excluded.

§ 424. The necessity for competent knowledge in the declarant may serve to explain and reconcile what is said in the books, respecting the inadmissibility of *reputation* in regard to *particular facts*. Upon general points, as we have seen, such evidence is receivable, because of the general interest which the community have in them; but particular facts, not being equally notorious, may be misrepresented, or misunderstood, and may have been connected with other facts, by which, if known, their effect might be limited or explained. Reputation as to the existence of such particular facts is therefore rejected. Thus, if the question is whether a road be public or private, declarations by old persons since dead, that they had seen repairs done upon it, will not be admissible (z); neither can evidence be received that a deceased person had planted a tree near the road, and had stated, at the time of planting it, that his object was to show where the boundary of the road was when he was a boy (a). So, proof of old persons having been heard to say that a stone was erected, or boys whipped, or cakes distributed, at a particular place, will not be admissible as evidence of boundary (b): and where the question was whether a turnpike stood within the limits of a town, though evidence of reputation was received to show that the town extended to a certain point, yet declarations by old people, since dead, that formerly there were houses where none

(z) Per Patteson, J., in *R. v. Bliss*, 7 A. & E. 552.

(a) *R. v. Bliss*, 7 A. & E. 550.

(b) Per Coleridge, J., in *R. v. Bliss*, 7 A. & E. 556

any longer stood, was rejected, on the ground that these statements were evidence of a particular fact (*c*). So, also, if the existence and amount of a parochial modus be in issue, hearsay evidence of the payment of a specific sum in lieu of tithes by a deceased occupier will be inadmissible; though general evidence of reputation, that it has always been customary to pay that sum for all the lands in the parish, will be received (*d*). Again, where the question was whether a certain place was parcel of a particular parish, an old book containing entries by a deceased churchwarden, not charging himself, but relating to the repairs of a chapel alleged to belong to the place in question, was held to be inadmissible (*e*); and the same ruling has prevailed, where entries in parish books, which recorded the fact that perambulations had taken a particular line, were tendered in evidence (*f*). Still, it has been usual to admit evidence of what old persons, since deceased, who accompanied the perambulators, have been heard to say upon such occasions (*g*); because, the custom of perambulating parishes having long received high judicial sanction as a legitimate mode of recording boundaries (*h*),—and the fact of a perambulation having taken place being considered in itself evidence of the exercise of a right (*i*),—it follows that statements made by perambulators may be regarded as declarations accompanying acts, which, on grounds formerly stated (*j*), will be admissible in evidence, provided they are not confined to particular circumstances (*k*).

§ 425. It is now held, contrary to a doctrine which formerly prevailed (*l*), that proof of the exercise of the right claimed within

(*c*) *Ireland v. Powell*, per Chambre, J., Pea. Ev. 16, cited by Williams, J., in *R. v. Bliss*, 7 A. & E. 555.

(*d*) *Harwood v. Sims*, Wightw. 112, more fully reported and explained in *Moseley v. Davies*, 11 Price, 162, 169—172; *Chatfield v. Fryer*, 1 Price, 253; *Wells v. Jesus College*, 7 C. & P. 284; *Deacle v. Hancock*, McClel. 85; 13 Price, 226, S. C. See also *Crease v. Barrett*, 1 C. M. & R. 919, 930; 5 Tyrwh. 458, 472, S. C. (*e*) *Cooke v. Banks*, 2 C. & P. 478, per Abbott, C. J.

(*f*) *Taylor v. Devey*, 7 A. & E. 409, 414.

(*g*) *Weeks v. Sparke*, 1 M. & Sel. 687, per Lord Ellenborough, and 689, per Le Blanc, J.

(*h*) *Taylor v. Devey*, 7 A. & E. 415.

(*i*) *Weeks v. Sparke*, 1 M. & Sel. 687, 689. (*j*) *Ante*, §§ 395, 400.

(*k*) 1 Ph. Ev. 248.

(*l*) Per Buller, J., in *Morewood v. Wood*, 14 East, 330, n.; *Weeks v. Sparke*, 1 M. & Sel. 688, 689, per Le Blanc, J., and 690, per Dampier, J.

the period of living memory, is not an essential condition of the reception of evidence of reputation; though, of course, the absence of such proof, in cases where the nature of the subject admits of its production, will materially affect the value of hearsay when received (*m*). Neither is it necessary that the opinions of deceased persons, which are tendered as evidence of common fame, should appear to rest on reputation derived from others, or should have been expressed in the course of a transaction relating to a question of reputation; and therefore, on an issue whether or not a lane in a certain hamlet was a common highway, a paper signed by several inhabitants of the hamlet, since dead, stating that the lane was not a highway, was received as slight evidence of reputation, although it had been drawn up at a public meeting, which had been convened for the sole purpose of considering the propriety of repairing the road, and although the opinions expressed in the document did not appear to have been founded on reputation received from others (*n*).

§ 426. It may further be observed, that reputation is evidence as well *against a public right* as in its favour; and this, too, whether the evidence consist of declarations which expressly negative the right, or set up an inconsistent claim, or simply omit all mention of the right on some occasion, when a notice of it might be reasonably expected. Thus, where the question was, whether a landing-place was public or private property, the declarations of ancient deceased persons, that it was the private landing-place of the party and his ancestors, were held admissible, the learned judge remarking, that there was no distinction between the evidence of reputation to establish, and that to disparage, a public right (*o*). So, where it became necessary to negative the existence of a particular manorial custom, the Court were strongly inclined to hold, though it became unnecessary to decide the point, that an ancient deed, made between the lord of

(*m*) *Crease v. Barrett*, 1 C. M. & R. 919, 930; 5 Tyrw. 458, S. C.; *R. v. Sutton*, 8 A. & E. 523, n. (*c*); *Curzon v. Lomax*, 5 Esp. 60, per Lord Ellenborough; *Steel v. Prickett*, 2 Stark. R. 466, per Abbott, C. J.; *Roe v. Parker*, 5 T. R. 32, per Grose. J.

(*n*) *Barraclough v. Johnson*, 8 A. & E. 99, 108.

(*o*) *Drinkwater v. Porter*, 7 C. & P. 181, per Coleridge, J.

the manor, and a great many of the copyholders, in which the latter claimed, and the former admitted and confirmed, what they mutually conceived to be the immemorial customs of the manor, but which deed omitted all mention of the particular custom in question, was strong evidence of reputation to show that it did not exist at that day, and that the subsequent usage relied upon in support of it, was referable to usurpation, and not to right (*p*).

§ 427. It will have been seen from several of the cases cited in this chapter, that oral declarations are not the sole medium of proving traditionary reputation in matters of public and general interest; and, indeed, the principle of the exception applies equally to documentary evidence, and to all other kinds of proof denominated hearsay. Thus, deeds (*g*), leases (*r*), and other private documents have been admitted, as declaratory of the public matters recited in them. Whether *maps*, showing the boundaries of towns, manors, and parishes, and proved to have been made or recognised by persons having adequate knowledge, would be admissible, is a question respecting which some doubts exist. On principle, they would seem to be valid evidence of reputation, and in a late trial of an indictment against a parish for the non-repair of a highway, where, in order to show that the road in question was not within the parish, a map was produced which had been made some thirty years before by a surveyor, from information derived from an old parishioner, who had pointed out to him the boundaries, Mr. Justice Erskine held, that, if proof could be given of the old man's death, the map would be admissible as evidence of reputation, though it came from the chest of the parish indicted (*s*). On another occasion, also, maps appear to have been received as public documents (*t*); but in an older case, where, in order to prove that the locus in quo was a highway, a copper-plate map, which purported on its face to have been taken by the direction of some

(*p*) *Marquis of Anglesey v. Lord Hatherton*, 10 M. & W. 218, 239—241, 244.

(*g*) *Curzon v. Lomax*, 5 Esp. 60, per Lord Ellenborough; *Brett v. Beales*, M. & M. 416, per Lord Tenterden.

(*r*) *Plaxton v. Dare*, 10 B. & C. 17; 1 M. & Ry. 1, S. C.; *Barnes v. Mawson*, 1 M. & Sel. 78, 79; *Marquis of Anglesey v. Lord Hatherton*, 10 M. & W. 218.

(*s*) *R. v. Milton*, 1 C. & Kir. 58.

(*t*) *Alcock v. Cook*, per Tindal, C. J., cited 1 Ph. Ev. 251, n. (1).

former churchwardens, and which it was proposed to prove was generally received by the parish as authentic, was rejected by Lord Kenyon, who observed, "that it would be equally improper to admit it, as to admit a plan taken by the lord of a manor, who might thereby crush and destroy the estates of his tenants (*t*)."¹ It does not appear in this case that the map was an ancient one, or that the churchwardens, by whose direction it was drawn, were dead, and consequently the decision is of the less authority.

§ 428. Again, presentments in manor courts (*u*), stating the customs or boundaries of a manor,—depositions of conventional tenants of a manor, taken in an authorised inquiry, and representing the rights of the lord (*v*),—and other similar documents, have been admitted as evidence of reputation (*x*); though, unless it can be satisfactorily proved, or at least reasonably inferred, that the proceedings were conducted in a legal and regular manner, it will seldom be prudent to run the risk of a new trial by tendering such evidence (*y*).

§ 429. It has often been said that *verdicts* of juries, and *judgments, decrees, and orders* of courts of competent jurisdiction, are evidence of reputation; and possibly, when juries were summoned *de vicineto*, and were consequently assumed to be acquainted with the subject in controversy (*z*), this may have been a correct mode of stating the ground on which verdicts were admitted; though it never could have been strictly accurate with respect to other judicial documents, and though it does not apply, at the present day, even to verdicts (*a*). Still these documents, though not reputation, are as good evidence as reputation (*b*); and whatever be the principle on which they are admitted, the rule has been established

(*t*) Pollard v. Scott, Pea. R. 19.

(*u*) Evans v. Rees, 10 A. & E. 151; Roe v. Parker, 5 T. R. 26; Arundell v. Lord Falmouth, 2 M. & Sel. 441.

(*v*) Crease v. Barrett, 1 C. M. & R. 919; 5 Tyrw. 458, S. C.; Freeman v. Phillips, 4 M. & Sel. 486. (*x*) See Evans v. Taylor, 7 A. & E. 626.

(*y*) See R. v. Leigh, 10 A. & E. 411.

(*z*) Pim v. Curell, 6 M. & W. 254, per Alderson, B.

(*a*) Evans v. Rees, 10 A. & E. 153, per Patteson and Coleridge, Js.; Brisco v. Lomax, 8 A. & E. 212, per Patteson, J.

(*b*) Brisco v. Lomax, 8 A. & E. 211, per Littledale, J.

by too many authorities to be now questioned (c), that, in all cases involving matters of public or general interest, wherein reputation is evidence, a verdict or a judgment upon the matter directly in issue, though pronounced in a cause litigated between strangers to the parties on the record, is also admissible; not as tending to prove *any specific fact existing at the time*, but as evidence of the most solemn kind, of an adjudication by a competent tribunal upon the state of facts and the question of usage at that time (d). Thus, for example, where a public right of way was in question, the plaintiff was allowed to show a verdict, rendered in his own favour against a defendant in another suit, in which the same right of way was in issue (e); and it matters not with respect to the admissibility, though it may as to the weight, of such evidence, that the judgment has been suffered by default, and, though of a very recent date, is not supported by any proof of execution or of the payment of damages (f); or even that the verdict, where a verdict has been obtained, has not been followed up by any judgment or decree (g). Neither is it material whether the verdict be pronounced at Nisi Prius, or be the finding of a jury summoned under a commission from a Duchy Court, or any other special commission; provided it can be proved, or can be inferred from the circumstances, that the inquiry was a lawful one (h).

§ 430. If, when the record is produced, there appears to have been a direct issue on the right or custom in controversy, the opponent will not be entitled to show that in fact no evidence was given on that issue; since the record is conclusive of the fact of such a finding, though not of its truth as between other parties (i). If the record contains no direct issue on the custom, the party producing it must furnish some evidence to show that the custom was really in question; for, otherwise, the mere verdict

(c) *Evans v. Rees*, 10 A. & E. 156, per Lord Denman.

(d) *Pim v. Curell*, 6 M. & W. 266, per Lord Abinger.

(e) *Reed v. Jackson*, 1 East, 355.

(f) *Earl of Carnarvon v. Villebois*, 13 M. & W. 313, 329, 332.

(g) *Brisco v. Lomax*, 8 A. & E. 198; 3 N. & P. 388, S. C.

(h) *Id.*

(i) *Reed v. Jackson*, 1 East, 355.

would prove nothing (*j*). In the late case of the Earl of Carnarvon *v.* Villebois, which was an action by the lord of a manor against a copyholder for trespassing on his free warren, an ancient judgment on a quo warranto information filed by the Attorney-General against a former lord, in which the defendant pleaded, and the Attorney-General confessed, a prescriptive title to the free warren as appurtenant to the manor, was received in evidence for the plaintiff, as being the judgment of a competent court upon a matter of a public nature which concerns the Crown and the subject. The Court observed, that "it was admissible on the same footing as an allowance before the justices of Eyre, an inquisition post mortem, or an injunction issuing out of the Court of Exchequer to ascertain the extent of the Crown lands" (*k*).

§ 431. Decrees and orders of all competent tribunals stand upon the same footing as verdicts (*l*); and, therefore, orders of the commissioners of sewers requiring land-owners to repair sea-walls, will, on an issue respecting the liability of a party to make such repairs, be evidence as adjudications by a court of competent jurisdiction; and the fact that they have been duly executed and acted upon will be presumed, if they are of an ancient date (*m*). To render decrees of a Court of Chancery admissible, it is unnecessary to put in the depositions to which they refer; because, in equity, the judge must collect the questions in dispute from the bill and answer only (*n*). Still, a decree, to be evidence, must be *final*; and mere *interlocutory orders*, not involving any judgment upon the rights of the parties, cannot be received (*o*). So anxious are the Courts to confine this species of evidence within strict limits, that they have rejected an award in a suit *inter alios*, though the cause was referred by order of the judge at *Nisi Prius* (*p*). It seems scarcely necessary to add, that no verdict,

(*j*) *Laybourn v. Crisp*, 4 M. & W. 325, 326, per Lord Abinger.

(*k*) 13 M. & W. 313, 331, per Parke, B.

(*l*) See *Laybourn v. Crisp*, 4 M. & W. 326, per Parke, B.

(*m*) *R. v. Leigh*, 10 A. & E. 398.

(*n*) *Laybourn v. Crisp*, 4 M. & W. 320, 326, 327. It seems that the depositions may be read by the opposite party as *his* evidence, *id.*

(*o*) *Pim v. Curell*, 6 M. & W. 234, 265—267.

(*p*) *Evans v. Rees*, 10 A. & E. 151; 2 P. & D. 627, S. C.; *R. v. Cotton*, 3 Camp. 444.

judgment, decree, or order, can be received, if it appear that the parties pronouncing it were acting without legal authority (*q*).

§ 432. It now becomes necessary to consider an important qualification of the exception under discussion, which is, that *declarations, to be admissible as evidence of reputation, must have been made before any controversy arose touching the matter to which they relate*; or, as it is usually expressed, *ante litem motam*. As this qualification is not confined to matters of public and general interest, but equally governs the admissibility of hearsay evidence in matters of pedigree, it will be convenient to illustrate its operation by referring indiscriminately to both these classes of cases. Now the ground on which the declarations of deceased persons are admitted at all, is, that they are the natural effusions of a party who is presumed to know the truth, and to speak upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth (*r*). But no man is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on the one side or the other; their minds are in a ferment; and, if they are disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *ex parte* declarations, even those upon oath, are rejected, if they can be referred to a date subsequent to the beginning of the controversy (*s*).

§ 433. This rule of evidence was familiar in the Roman law; but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to any earlier period of the controversy (*t*). But in our law, the term *lis* is taken in the

(*q*) *Rogers v. Wood*, 2 B. & Ad. 245.

(*r*) Per Lord Eldon, in *Whitelocks v. Baker*, 13 Ves. 514; *R. v. Cotton*, 3 Camp. 446, per Dampier, J.

(*s*) *Berkeley Peerage*, 4 Camp. 401, 409, 413; *Monkton v. Att.-Gen.*, 2 Russ. & My. 160, 161; *Richards v. Bassett*, 10 B. & C. 657.

(*t*) *Lis est, ut primum in jus, vel in judicium ventum est; antequam in judicium veniatur, controversia est, non lis*. Cujac. Opera Posth. tom. 8, col. 193, B. & col. 162, D. *Lis inchoata est ordinata per libellum, et satisfactionem, licet non sit lis contestata*. Corpus Juris Glossatum, tom. 1, col. 553, ad Dig. lib. iv. tit. 6, l. 12. *Lis mota censetur, etiamsi solus actor egerit*. Calv. Lex. Verb. Lis mota.

classical (*u*) and larger sense of *controversy*; and by *lis mota* is understood the commencement of the controversy, and not the commencement of the suit (*v*). The commencement of the controversy has been further defined by Mr. Baron Alderson, in a case of pedigree, to be "the arising of that state of facts, on which the claim is founded, without any thing more" (*x*); but this ruling, though afterwards upheld by Lord Cottenham (*y*), has since been directly disputed in Ireland by Lord Chancellor Sugden (*z*), and has also been lately questioned in the English Exchequer Chamber. It may therefore be now considered a point of considerable doubt and importance, "whether there must not be, not merely facts which may lead to a dispute, but a *lis mota* or suit, or controversy preparatory to a suit, actually commenced, or dispute arisen, and that upon the same pedigree or subject-matter which constitutes the question in litigation" (*a*).

§ 434. Whatever may be the precise limits of the rule of exclusion, thus much is perfectly clear; first, that declarations will not be rejected, in consequence of their having been made *with the express view of preventing disputes*; secondly, that they are admissible, if no dispute has arisen, though made in *direct support of the title* of the declarant; and, thirdly, that the mere fact of the declarant having stood, or having believed that he stood, in *pari jure* with the party relying on the declaration, will not render his statement inadmissible. In support of the first proposition, the Berkeley Peerage case may be referred to, where the judges unanimously held, in conformity with an earlier opinion expressed by Lord Mansfield (*b*), that an entry made by a father in any book, for the express

(*u*) "*Philosophi statem in litibus conerunt.*"—Cic. Cited by Lawrence, J., in Berkeley Peerage, 4 Camp. 411.

(*v*) Per Sir James Mansfield, in Berkeley Peerage, 4 Camp. 417; *Monkton v. Att.-Gen.*, 2 Russ. & My. 161.

(*x*) *Walker v. Beauchamp*, 6 C. & P. 552, 561.

(*y*) *Davies v. Lowndes*, 7 Scott, N. R. 198; 6 M. & Gr. 517, S. C.

(*z*) *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 335, 344—349; 1 Drury, Ch. R. temp. Sugden, 120, 140—155, S. C.

(*a*) *Davies v. Lowndes*, 7 Scott, N. R. 214, per Lord Denman; 6 M. & Gr. 528, S. C.; Berkeley Peerage, 4 Camp. 401; *Slaney v. Wade*, 1 Myl. & Cr. 338, 356.

(*b*) *Goodright v. Moss*, 2 Cowp. 591.

purpose of establishing the legitimacy of his son and the time of his birth, in case the same should be called in question, will be receivable in evidence notwithstanding the professed view with which it was made (c). This doctrine has since been sanctioned by Lords Brougham (d) and Cottenham in England (e), and by Sir Edward Sugden in Ireland (f), and may now be considered as established law in both countries. The latest decision in support of the second proposition is *Doe v. Davies* (g), where the Court observed, that although a feeling of interest will often cast suspicion on declarations, it has never been held to render them inadmissible. The third proposition is equally clear law; for although there is a peerage case which appears, at first sight, to throw some doubt upon the subject (h); yet it is highly probable that the pedigree was there rejected, not as having been made by a party while standing in the same situation as the claimant, but as having been concocted by such person in direct contemplation of himself laying claim to the dignity. Even if this be not so, one isolated decision can scarcely controvert a rule of law, which has been sanctioned and acted upon by numerous judges (i), and which is so founded on reason, that a contrary doctrine would go far towards excluding all evidence of reputation. For instance, in cases of public and general interest, the rejection of such evidence would be wholly inconsistent with the rule, which requires the statement to have been made by some person having competent knowledge of the subject (j); and in cases of pedigree, though the result of excluding declarations of persons in *pari jure* would not be equally mischievous, it would frequently have the effect of drying up sources of information which would be highly valuable

(c) 4 Camp. 418.

(d) *Monkton v. Att.-Gen.*, 2 Russ. & My. 147, 160, 161, 164.

(e) *Slaney v. Wade*, 1 My. & Cr. 338.

(f) *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 335, 344—349.

(g) 16 L. J. (N. S.) Q. B. 222.

(h) *Zouch Peerage*, Pr. Min. 207.

(i) *Moseley v. Davies*, 11 Price, 162, 179, per Graham, B.; *Harwood v. Sims*, Wightw. 112; *Deacle v. Hancock*, 13 Price, 236, 237; *Monkton v. Att.-Gen.*, 2 Russ. & My. 159, 160, per Lord Brougham; *Freeman v. Phillippa*, 4 M. & Sel. 486, 491, per Lord Ellenborough, cited with approbation by Lord Lyndhurst, C. B., in *Davies v. Morgan*, 1 C. & Jer. 593, 594; *Nicholls v. Parker*, 14 East, 331, n.; *Doe v. Tarver*, Ry. & M. 141, 142, per Abbott, C. J. (j) *Ante*, § 418.

in the investigation of truth. In any one of the three classes of declarations just mentioned, it is very possible that the declarant may have had some secret wish or bias, which may have induced him to make a statement either partially or totally false; but the same observation might apply to all evidence of this nature, and its weight in each particular case must be determined by the jury.

§ 435. There is sound sense in that branch of the rule under discussion which requires that the dispute should have related to *the particular subject in issue*; for although, when such a controversy has arisen, it may reasonably be feared that the fountain of evidence will be rendered turbid thereby; yet the mere discussion of other topics, however similar they may be in their general nature to the real matter in dispute, does not necessarily lead to the inference that that matter was controverted, and therefore is not deemed sufficient to exclude the sort of proof we are now considering. Thus, in a suit between a copyholder and the lord, where the point in issue was, whether a certain customary fine was to be assessed by the jury of the lord's court; depositions taken in an ancient suit against a former lord, where the controversy turned on the *amount* of such fine, in which depositions the fine was mentioned as assessible by the lord, were admitted as evidence to negative the existence of any custom for the jury to interfere (*k*). In that case, it was observed by one of the learned judges, that "the distinction had been correctly taken, that where the *lis mota* was on the very point, the declarations of persons would not be evidence; because you cannot be sure, that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question, who embark, to a certain degree, with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply" (*l*).

§ 436. It is not, however, necessary that the former controversy

(*k*) Freeman v. Phillipps, 4 M. & Sel. 486; Elliott v. Piersol, 1 Peters, 328, 337.

(*l*) Freeman v. Phillipps, 4 M. & Sel. 497, per Bayley, J.

should have been between the same parties, or should have related to the same property or claim, provided it appears that the matters, respecting which the declarations offered in evidence on the second trial were made, were in the former dispute really under discussion; and therefore in the Berkeley Peerage case, where the question before the Committee of Privileges respected the legitimacy of the claimant, and this turned on the fact whether his parents, who had married after his birth, and had subsequently had several children, had likewise been privately married two years before he was born; a deposition of the father, wherein he swore positively to the fact of the first marriage, was rejected, it having been taken some years before, in a suit instituted by the claimant and three of his brothers born before the second marriage against the other children born after that event, for the purpose of perpetuating the testimony of the legitimacy of the former, who claimed in that character to be entitled in remainder to an estate then held by the father (m). So, in the Sussex Peerage case, where the claimant, Colonel D'Este, was required to prove that his parents, the Duke of Sussex and Lady Augusta Murray, were legally married, declarations contained in the duke's will, and affirming most solemnly the fact of marriage, as also statements to the same effect made by his Royal Highness in conversation, were rejected; it appearing that some years previously to such declarations and statements being made, a suit had been instituted by the Crown to annul the Prince's marriage, and it not being shown, as in truth it could not be, that that marriage was not the very marriage on which the claimant relied (n).

§ 437. Whether declarations, made after the controversy has originated, are, in all events, to be excluded, even though proof be offered that the *existence of the controversy was not known* to the declarant, is a question respecting which some doubt exists. In the Berkeley Peerage case, Sir James Mansfield stated broadly that the affirmative of the proposition was the law, and added, as a reason, that "If an inquiry were to be instituted in each instance, whether the existence of the controversy was or

(m) 4 Camp. 401.

(n) 11 Cl. & Fin. 85, 99—103.

was not known at the time of the declaration, much time would be wasted, and great confusion would be produced"(o). On the other hand, Mr. Baron Graham, in the same case, contended that declarations were receivable, whenever it clearly appeared that the declarant could not have known that a suit was commenced or contemplated (p); while, in a later case (q), Lord Brougham, speaking of a pedigree, observed, "Prove that it was made post litem motam, not meaning thereby a suit actually pending, but a controversy existing, and that *the person making or concocting the declaration took part in the controversy* (r): show me even that there was a contemplation of legal proceedings, *with a view to which the pedigree was manufactured*, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve. The question then always will be, was the evidence in the particular case manufactured, or was it spontaneous and natural? If I thought that this came within the description of manufactured evidence—manufactured for a purpose connected with the present controversy—I should, of course, at once have rejected it"(s).

§ 438. In this conflict of judicial opinions it is difficult to ascertain the precise rule; but perhaps we shall not be far wrong in suggesting that neither of the learned judges has laid down the law with strict accuracy, and that declarations, though made post

(o) 4 Camp. 417.

(p) Id. 407.

(q) *Monkton v. Att.-Gen.*, 2 Russ. & My. 147, 161.

(r) In *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 348, Sugden, Ch., observed, that "this last sentence must have crept in by mistake;" and added, "It is not necessary, in order to exclude the evidence of a declaration, to show that the person making it took part in the controversy; it is perfectly settled that he need not be shown to have known of it." It will be remarked that, in this passage, his Lordship leaves the question untouched, as to what would be the effect of proving that the declarant *did not know* of the existence of the controversy, and merely states what is unquestionably the law, that the onus of showing knowledge does not lie on the party objecting to the evidence.

(s) 2 Russ. & My. 161. In *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 349, Sugden, Ch., while commenting on this language of Lord Brougham, observes, "This is a sound and sensible exposition of the law. Suppose this state of facts existed; suppose a party lay by, forbearing to assert his claim, in order to enable him to assert it with more force afterwards by manufacturing evidence in his own favour, then, if you prove that that was done, if you show that the evidence was manufactured, the law excludes it."

litem motam, will be admissible, if the party offering them in evidence can show, by any proof satisfactory to the judge, that the declarant was *in all probability* ignorant of the existence of the controversy. The Roman law may be cited in support of this suggestion; for though the civilians rejected, like ourselves, hearsay originating post litem motam, they recognised a distinction in favour of those declarations, which were made in a place so remote from the scene of controversy as to remove all suspicion that the declarant had heard of its existence. The rule and exception are thus stated by Mascardus:—"Nec vero tantummodo debent esse personæ graves, sed etiam debent deponere se audivisse ea quæ asserunt ante litem motam: quod si post litem motam deponerent, non solum non probarent, sed nec ullam fidem facerent; quia facile contingere potest, ut quispiam id audiverit ab alio, qui illud protulit in frandem, vel quod lis ipsa mota traxerit istam famam." "Istud autem quod diximus, debere testes deponere ante litem motam, sic est accipiendum, ut verum sit, si ibidem, ubi res agitur, audierit; at si alibi in loco, qui longissimè distaret, sic intellexerit, etiam post litem motam testes de auditu admittuntur. Longinquitas enim loci in causa est, ut omnis suspicio abesse videatur, quæ quidem suspicio adesse potest, quando testis de auditu post litem motam ibidem, ubi res agitur, deponit" (t).

(t) Mas. de Prob., vol. 1, p. 401 (429), Concl. 410, n. 5, 6.

CHAPTER IX.

QUESTIONS OF PEDIGREE.

§ 439. QUESTIONS OF PEDIGREE form the *second* exception to the general rule rejecting hearsay evidence. This exception has been recognised on the ground of necessity; for as, in inquiries respecting relationship or descent, facts must often be proved, which occurred many years before the trial, and were known but to few persons, it is obvious that the strict enforcement of the ordinary rules of evidence in cases of this nature would frequently occasion a grievous failure of justice. Courts of law have therefore so far relaxed these rules in matters of pedigree, as to allow parties to have recourse to traditional evidence; often the sole species of proof which can be obtained. Still, it is not considered safe to admit such evidence without qualification; and though it was long doubtful whether the declarations of servants, friends, and neighbours, might not be received, the settled rule of admission is now restricted to hearsay, proceeding from persons who were *de jure related by blood or marriage* to the family in question, and consequently may be supposed to have had the greatest interest in seeking, the best opportunities for obtaining, and the least reason for falsifying, information on the subject (a).

§ 440. So strictly has this limitation been enforced in recent

(a) *Johnson v. Lawson*, 2 Bing. 86; 9 Moore, 183, S. C.; *Crease v. Barrett*, 1 C. M. & R. 928; *Vowles v. Young*, 13 Ves. 147, per Lord Erskine; *Goodright v. Moss*, 2 Cowp. 594, per Lord Mansfield, as explained by Lord Eldon in *White-locke v. Baker*, 13 Ves. 514; *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 159, per Lord Brougham; *Stafford Peerage*, 1825, Pr. Min. p. 4; *Jewell v. Jewell*, 1 Howard, S. Ct. Rep. 231; 17 Peters, 213, S. C.; *Jackson v. Browner*, 18 Johns. 37; *Chapman v. Chapman*, 3 Conn. 347; *Waldron v. Tuttle*, 4 N. Hamp. 371. In *Davies v. Lowndes*, 7 Scott, N. R. 188, Parke, B., observes, "There seems to be no limitation in the rule as to blood relations; but, with regard to relationship by affinity, it is different; it seems to be confined to declarations by a husband as to his wife's relations." See also S. C., p. 212.

times, that the declaration of an *illegitimate* member of a family, asserting that one of his natural brothers had died without issue, has been rejected (*b*). In an older case (*c*), where the question was whether an eldest son, who had taken possession of the paternal estates, and conveyed them to one of the litigants, was born in wedlock, his own declaration that he was a bastard, though made subsequently to the conveyance, was, after his death, received by Mr. Justice Le Blanc. The learned judge appears to have considered this statement admissible, "as the representation of one of the family of the degree of relationship he bore to it;" but if the case just cited be law, as it would probably be deemed at the present day, the decision can scarcely rest upon this ground, unless the special circumstances of the case be prayed in aid; and it be contended, that, since the defendant's claim rested on the legitimacy of the vendor, he could not object to the vendor's declaration, without relinquishing the only prop of his title. Should this refined argument be deemed inconclusive, perhaps the admissibility of the declaration might be sustained, on the ground that the cause turned, not only on the condition of the father's family, but on the actual status of the declarant himself; but here we are met by the difficulty, that the son could only have known the fact of his own illegitimacy by information received from others; and, as a bastard has in the eye of the law no relatives, the hearsay must have been derived from strangers, and its admissibility might on that ground be questioned. On the whole, it may be considered as a point of great doubt, whether, under any circumstances, the declarations of a person deceased, asserting his own illegitimacy, can be received; excepting as admissions against himself and those who claim under him by some title derived subsequently to the statements being made (*d*). In the case referred to above (*e*), evidence was received that the father had specified the time of his marriage, had declared his eldest son to have been born before that date, had heaped upon him opprobrious epithets implying

(*b*) *Doe v. Barton*, 2 M. & Rob. 28, per Patteson, J. See *Doe v. Davies*, 16 L. J. (N. S.) Q. B. 218.

(*c*) *Cooke v. Lloyd*, Pea. Ev. App. xxviii., per Le Blanc, J.

(*d*) See *R. v. Rishworth*, 2 Q. B. 487, per Wightman, J.

(*e*) See n. (*c*), ante.

illegitimacy, and had on his death-bed pointed to his younger son as his heir; and these declarations would seem to have been clearly admissible, if not as directly proving the bastardy of a person, who, though *de facto* his son, was *de jure* a stranger to him, at least as showing the position of the legitimate portion of his family, through whom the plaintiff claimed his title (*f*). It may be observed, by way of caution, that had the declarations of the father been confined to a general statement that his eldest son was illegitimate, they might possibly have been rejected; for as such statements might have been made in consequence of non-access after marriage, they would seem to fall within the rule of law, which precludes parents from giving testimony to bastardize their issue born during wedlock (*g*).

§ 441. If a man has once been connected with a family by marriage, the death of his wife will not dissolve that connection, so as to render inadmissible declarations subsequently made by him; and therefore where, in a case of pedigree, a witness was asked whether he had not heard a husband since deceased state, after his wife's death, that she was illegitimate, the answer was received, though the counsel declined to put the further question, whether the husband had derived his information from the wife during the coverture (*h*). The Court presumed in this case that the knowledge must have been obtained by the husband whilst he was a member of the family (*i*).

§ 442. Again, no valid objection can be taken to evidence of this kind, on the ground that it is *hearsay upon hearsay*, provided all the declarations come from different members of the same family, or do not directly appear to have been derived from strangers. Thus, the declarations of a deceased widow, respecting a statement which her husband had made to her, as to who his cousins were,—as also the declaration of a relative, in which he asserts

(*f*) See *Goodright v. Moss*, 2 Cowp. 593, 594, per Lord Mansfield.

(*g*) *R. v. Sourton*, 5 A. & E. 180.

(*h*) *Vowles v. Young*, 13 Ves. 140, per Lord Erskine; *Doe v. Harvey*, Ry. & M. 297, per Littledale, J. But see observations in last section.

(*i*) Per Burrough, J., in *Johnson v. Lawson*, 2 Bing. 92; 9 Moore, 194, S. C.

generally that he has *heard* what he states,—have been received. If this were not so, the main object of relaxing the ordinary rules of evidence would be frustrated, since it seldom happens that the declarations of deceased relatives embrace matters within their own personal knowledge (*j*). Even *general repute in the family*, proved by the testimony of a surviving member of it, has been considered as falling within the rule (*k*). Moreover, it is not necessary to show that the declarations were contemporaneous with the events to which they relate; for, as Lord Brougham has well observed, such a restriction “would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence;” and, to use a homely illustration, would even render inadmissible the statement of a deceased person as to the maiden name of his own grandmother (*l*).

§ 443. Before a declaration can be admitted in evidence, the *relationship of the declarant* with the family *must be established* by some proof, *independent of the declaration* itself (*m*); and although in tracing ancient pedigrees, the Court would probably be satisfied with slight evidence on this head, since the connection of the declarant with the family might be equally difficult of proof with the very fact in controversy, yet some evidence would certainly be required; for, otherwise, a stranger, by claiming alliance with a family, and then making statements respecting it, might assume to himself the power, after death, of materially altering the relative rights of its several branches (*n*). It seems, however, unnecessary

(*j*) *Doe v. Randall*, 2 Moo. & P. 20; *Monkton v. Att.-Gen.*, 2 Russ. & My. 165, 166, per Lord Brougham; *Slaney v. Wade*, 7 Sim. 611, per V.-Ch.; 1 My. & Cr. 355, S.C., per Lord Cottenham. See *Robson v. Att.-Gen.*, 10 Cl. & Fin. 500—503, and *Davies v. Lowndes*, 7 Scott, N. R. 211-213; 6 M. & Gr. 525-527, S.C. See post, § 455.

(*k*) *Doe v. Griffin*, 15 East, 293; B. N. P. 295.

(*l*) *Monkton v. Att.-Gen.*, 2 Russ. & My. 157, 158; *Lovat Peerage*, Pr. Min. p. 89.

(*m*) *Monkton v. Att.-Gen.*, 2 Russ. & My. 156, 157; *Banbury Peerage*, 2 Selw. N. P. 754; Per Lord Eldon, in *Berkeley Peerage Case*, 4 Camp. 419; *Leigh Peerage*, Pr. Min. p. 307; *Stafford Peerage*, 1825, Pr. Min. p. 5; *R. v. All Saints*, 7 B. & C. 789, per Bayley, J.; *Davies v. Morgan*, 1 Cr. & Jer. 591, per id.

(*n*) See *Doe v. Randall*, 2 Moo. & P. 24, per Best, C. J.

to show the exact degree of relationship that subsists between the declarant and the person respecting whom the declarations are tendered, but it will be sufficient to prove that they were in some manner connected by blood or marriage (*o*); and if the question be whether any, or what, relationship subsists between two supposed branches of the same family, it is only necessary to establish the connection of the declarant with either branch (*p*). It has, indeed, been urged, that proof must be given connecting the declarant with both branches; but this proposition involves the absurdity, that if such a limitation were allowed, the declarations would be superfluous, as merely tending to prove a connection, which, by showing that the declarant was related to both branches, had already been established (*q*).

§ 444. Though hearsay evidence is admitted in cases of pedigree, on the assumption that no better evidence can be procured, yet the rule being once established, such evidence will not be rejected, though living witnesses might have been called to prove the very facts to which it relates (*r*). Thus, the declarations of a deceased mother, as to the time of the birth of her son, have been received, though the father was living and was not called (*s*). Still, if the declarant himself be alive, and capable of being examined, his declarations will be rejected (*t*). Another qualification, restricting the admission of hearsay evidence in matters of pedigree, has already been pointed out and discussed in the last chapter; we allude to the rule rejecting all hearsay declarations which are made *post litem motam* (*u*).

§ 445. The term *pedigree* embraces not only general questions of descent and relationship, but also the particular facts of *birth*, *marriage*, and *death*, and the *times* when, either absolutely or relatively, these events happened. All these facts, therefore, may be proved by hearsay derived from relatives, though, with respect

(*o*) See *Vowles v. Young*, 13 Ves. 147.

(*p*) *Monkton v. Att.-Gen.*, 2 Russ. & My. 157, per Lord Brougham.

(*q*) *Id.*

(*r*) 1 Ph. Ev. 212.

(*s*) *R. v. Birmingham*, cited in *Hubback, Ev. of Succession*, p. 680.

(*t*) *Pendrell v. Pendrell*, 2 Str. 924.

(*u*) *Ante*, §§ 432—438.

to specific dates, some doubts have been entertained as to the extent and application of the rule. Thus, on the trial of an issue out of Chancery, Chief Justice Tindal has rejected the declarations of deceased persons, which were tendered to prove the ages of their relatives, on the ground that, though admissible for the purpose of showing the relationship, they could not be received as proof of particular facts, such as the ages of parties (*v*). Mr. Justice Patteson has also expressed a strong opinion adverse to the admissibility of such evidence, where the question was, whether, in support of a plea of infancy, letters written by the deceased father of the defendant could be read in evidence (*w*). Perhaps, in this last case, the opinion of the learned judge may have been influenced by the consideration, that the suit did not relate to a matter of pedigree; for although, as Mr. Phillipps justly observes, "there appears to be no foundation for a distinction between cases where a matter of pedigree is the direct subject of the suit, and other cases where it occurs incidentally" (*x*),—yet by one learned judge at least this distinction has been recognised (*y*). The authority, too, of Chief Justice Tindal's decision in the case above referred to, has been much shaken; for when it was brought before Lord Brougham on a motion for a new trial, his lordship intimated a very strong opinion in favour of the admissibility of the evidence, and subsequently stated that Mr. Justice Park and Mr. Justice Littledale, to whom he had submitted the point, entirely concurred in the view he had taken (*z*). If to these high authorities be added several old and some modern decisions expressly in point (*a*), the dicta of judges (*b*), the opinions of text writers (*c*), and the general practice of the profession, the student will probably be justified in concluding

(*v*) *Kidney v. Cockburn*, 2 Russ. & My. 168.

(*w*) *Figg v. Wedderburne*, 6 Jurist, 218.

(*x*) 1 Ph. Ev. 216, n. 5.

(*y*) *Whittuck v. Waters*, 4 C. & P. 375, per Park, J.

(*z*) *Kidney v. Cockburn*, 2 Russ. & My. 170, 171.

(*a*) *Herbert v. Tuckal*, T. Raym. 84; recognised by Lord Ellenborough in *Roe v. Rawlings*, 7 East, 290; case cited in 1 Ph. Ev. 214, from Vin. Ab. Ev. T. b. 91; *Vulliamy v. Huskisson*, 3 Y. & Col. Ex. 82, per Lord Abinger; *Ryder v. Malborne*, cited 2 Russ. & My. 169, as a decision by Littledale, J.

(*b*) Per Lord Mansfield in *Goodright v. Moss*, 2 Cowp. 594; per Lord Brougham, in *Monkton v. Att.-Gen.*, 2 Russ. & My. 156.

(*c*) 1 Ph. Ev. 213; *Hubback, Ev. of Succession*, 649; 3 St. Ev. 841.

that the proposition contended for by Chief Justice Tindal and Mr. Justice Patteson is not law.

§ 446. It may be urged that, as hearsay evidence of particular facts is inadmissible in support of public rights (*d*), the same rule should prevail in matters of pedigree; but, in the Berkeley Peerage case, Sir James Mansfield drew a distinction between these two subjects of inquiry, which, we submit, puts the law in its proper light. "In cases of general right," said his Lordship, "which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood; and family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects, may be presumed to be true" (*e*).

§ 447. Still the hearsay evidence must, it seems, be *confined to such facts as are immediately connected* with the question of pedigree; and declarations as to independent facts, from which the date of a genealogical event may be inferred, will probably be rejected. It is not easy to express this limitation of the rule in intelligible language, but the following cases will explain its purport. In a question of legitimacy, turning upon the time of birth, declarations by the deceased sister of the alleged bastard's mother, stating that she had suckled the child, were tendered in evidence;

(*d*) Ante, § 424.

(*e*) 4 Camp. 415, 416.

and being coupled with proof of the time when her own child was born, tended to fix the alleged bastard's birth at a period subsequent to its parents' marriage. Mr. Baron Gurney admitted this evidence; but Lord Cottenham expressed an opinion that he was wrong in so doing (*f*). In another old case (*g*), where the question turned on the relative seniority of three sons, born at a birth, declarations by the father that he had christened them Stephanus, Fortunatus, and Achaius, according to the order of names in St. Paul's First Epistle to the Corinthians (*h*), for the purpose of distinguishing their seniority, as also declarations by an aunt, who was present at the confinement, and who, with a similar object, had tied strings round the arms of the second and third child, were admitted. The distinction between these two cases is clear. In the former, the fact of suckling the child had no direct bearing on its age or legitimacy, but was only a species of circumstantial evidence from which these facts might be inferred; whereas, in the latter, the christening and the tying strings round the arms of the children, were intended from the first to afford the means of ascertaining their relative seniority.

§ 448. When the rule admitting hearsay evidence in matters of pedigree was first established, strenuous efforts were made to include within its operation all questions in *settlement cases*, whether relating to matters of pedigree or not, which from the antiquity of the facts involved in them were difficult of proof; but these efforts failed (*i*); and so strictly has the rule been confined to matters of pedigree, that the declarations of a deceased father as to the *place* of his child's birth have been rejected (*j*), though he was obviously more likely to remember this fact with accuracy than the mere *time* when the child was born. Still, there are occasions when hearsay evidence of *locality* would seem to be admissible. Thus, if it be necessary to show, that a family had

(*f*) *Isaac v. Gompertz*, cited in Hubback, *Ev. of Succession*, 650.

(*g*) *Vin. Ab. Ev. T. b. 91*; probably referred to, as *Spadwell v. —*, by Lawrence, J., in the *Berkeley Peerage case*, 4 *Camp.* 410.

(*h*) *Ch. 16, v. 17*.

(*i*) *R. v. Eriswell*, 3 *T. R.* 707; *R. v. Chadderton*, 2 *East*, 29; *R. v. Ferry Frystone*, *id.* 53; *R. v. Abergwilly*, *id.* 62.

(*j*) *R. v. Erith*, 8 *East*, 539.

had relations who lived at a particular place, declarations by a deceased member of the family, that "he was going to visit his relatives at that place," will be evidence; not, indeed, that he went there, or that any person of his name lived in that neighbourhood; but as proving a tradition in the family, that they once had relations living in the place in question, which tradition, in the event of its being shown by other evidence that persons of the same name had resided there, might be important as a mode of identifying those persons with the branch of the family alluded to (*k*). So, evidence has been received of a family tradition, that a particular individual died in India, for the purpose of connecting that individual with the family of the claimant (*l*).

§ 449. The forms under which hearsay evidence in matters of pedigree may be presented, are very numerous. Not only are the oral declarations of deceased relatives admissible, but *family conduct*, such as the tacit recognition of relationship, and the disposition and devolution of property, will also be received, as evidence from which the opinion and belief of the family may be inferred, and as resting ultimately on the same basis as evidence of family tradition. For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity. Thus, it was remarked by Sir James Mansfield, in the Berkeley Peerage case, that, "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate" (*m*). So, the concealment of the birth of a child from the husband,—the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother,—and the fact that the child and its descendants assumed the name of the adulterer, and had never been recognised in the family as the legitimate offspring of the husband,—are circumstances that will go far to rebut the presumption of legitimacy, which the law raises

(*k*) *Rishton v. Nesbitt*, 2 M. & Rob. 554, per Rolfe, B.

(*l*) *Id.* 556, citing *Monkton v. Att.-Gen.*, 2 Russ. & My. 147—151.

(*m*) 4 Camp. 416.

in favour of the issue of a married woman (*n*). Again, if the question be whether a person, from whom the claimant traces his descent, was the son of a particular testator, the fact that all the members of the family appear to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show, either that he was not the son, or at least that he had died without issue before the date of the will (*o*); and if the object be to prove that a man died without children, the production of his will, in which no notice is taken of his family, and by which his property is left to strangers or collateral relations, is cogent evidence of his having died childless (*p*).

§ 450. *Entries made by a parent or relation in bibles (q)*, prayer-books (*r*), missals (*s*), almanacs (*t*), or indeed in any other book, or in any document or paper (*u*), stating the fact and date of the birth, marriage (*v*), or death of a child, or other relation, are also received as the written declarations of the deceased persons who respectively made them. It would even seem that entries in a family bible would be admissible, without proof that they had been made by a relative; for as this book is the ordinary register of families, and is usually accessible to all its members, the presumption would be that the whole family had more or less adopted the entries contained in it, and had thereby given them

(*n*) *Goodright v. Saul*, 4 T. R. 356, per Ashurst, J.; *Morris v. Davies*, 5 Cl. & Fin. 163, 241, et seq.; *Banbury Peerage*, App. note (*e*) to *Le Marchant's Rep.* of *Gardner Peerage*, 389, 432, 433; 1 Sim. & Stu. 153, S.C.; *R. v. Mansfield*, 1 Q. B. 444; *Townshend Peerage*, 10 Cl. & Fin. 289.

(*o*) *Tracy Peerage*, 10 Cl. & Fin. 190, per Lord Campbell; *Robson v. Att.-Gen.*, id. 498—500, per Lord Cottenham. See ante, § 426, ad fin.

(*p*) *Hungate v. Gascoyne*, 2 Phill. 25.

(*q*) *Berkeley Peerage*, 3rd question, 4 Camp. 401.

(*r*) *Leigh Peerage*, Pr. Mi. p. 310.

(*s*) *Slane Peerage*, Pr. Mi. pt. 2, p. 49; 5 Cl. & Fin. 41, S.C.

(*t*) *Herbert v. Tuckal*, Sir T. Raym. 84.

(*u*) *Berkeley Peerage*, 3rd question, 4 Camp. 418. See *Jackson v. Cooley*, 8 Johns. 128, 131; *Douglas v. Saunderson*, 2 Dall. 116; *Carakadden v. Poorman*, 10 Watts, 82.

(*v*) In the *Sussex Peerage* case, an entry made by the mother of the claimant in her prayer-book, declaring the fact of her marriage, was admitted in evidence, 11 Cl. & Fin. 85, 98.

authenticity (*w*). This presumption, however, will not prevail in favour of an entry in any other book, however religious its character may be, but proof must be given, either that the entry was made by some member of the family (*x*), or that it has been acknowledged or treated by a relative as a correct family memorial (*y*), or, at least, if ancient, that it was made at the time when it purports to have been written. In order to establish this last fact, the evidence of skilled witnesses, conversant with manuscripts of different ages, is admissible, though, as we have before observed, such evidence is entitled to very little weight (*z*).

§ 451. Again, the correspondence of deceased members of the family (*a*), will, on proof of the handwriting (*b*), be received, as will also *recitals in marriage settlements* (*c*), and other *family deeds, descriptions in wills* (*d*), and the like. Even a cancelled will, which did not appear to have been ever acted upon, has been admitted, on proof that it was found among the papers of a descendant of the testator, who seemed to have kept it as containing statements relative to the family (*e*). So, recitals of descent, and descriptions of parties, in deeds, other than family instruments, will be received, provided the deeds are proved to have been executed by some member of the family to which the statements refer (*f*). But, this is an indispensable requisite;

(*w*) Berkeley Peerage, 4 Camp. 421, per Lords Ellenborough and Redesdale; *Monkton v. Att.-Gen.*, 2 Russ. & My. 162, 163, per Lord Brougham.

(*x*) Tracy Peerage, cited Hubback, *Ev. of Succession*, 673.

(*y*) Hood v. Beauchamp, 8 Sim. 26.

(*z*) Tracy Peerage, 10 Cl. & Fin. 154; ante, § 46.

(*a*) Huntingdon Peerage, Att.-Gen.'s Rep. 357; *Kidney v. Cockburn*, 2 Russ. & My. 168; *Leigh Peerage*, Pr. Min. pt. 2, p. 140; *Hastings Peerage*, Pr. Min. 196.

(*b*) Marchmont Peerage, Pr. Min. 345, 353. See also *Airth Peerage*, Pr. Min. 105.

(*c*) *Neal v. Wilding*, 2 Str. 1151; *Chandos Peerage*, Pr. Min. 27; *Stafford Peerage*, Pr. Min. 110; *Zouch Peerage*, Pr. Min. 276; *Devon Peerage*, by Nicolas, 1832, app. pp. 44, 46; *Liale Peerage*, Pr. Min. 116, 127; *Banbury Peerage*, Pr. Min. 6, 117; *Vaux Peerage*, Pr. Min. 44; *Huntly Peerage*, Pr. Min. 15; *Roscommon Peerage*, Pr. Min. 36.

(*d*) *Vulliamy v. Huskisson*, 3 You. & Col. Ex. 82, per Lord Abinger; *Liale Peerage*, by Nicolas, 51, 53. (e) *Doe v. Pembroke*, 11 East, 504.

(*f*) *Marmyon Peerage*, Pr. Min. 111; *Hastings Peerage*, Pr. Min. 200; *Borthwick Peerage*, Pr. Min. 62. See *Stokes v. Dawes*, 4 Mason, 268.

and therefore, where an indenture of assignment, which recited that the assignee was the son of certain parties, was executed alone by the assignor, who was not a member of the family, it was rejected (*g*); and a similar fate attended a deed of conveyance, wherein the grantors recited the death of a man's sons, who were tenants in tail male, and *declared themselves* heirs of the bodies of his daughters, who were devisees in remainder (*h*). In regard to recitals of pedigree in bills and answers in Chancery, a distinction has been taken between those facts which are not in dispute, and those which are in controversy; the former being admitted as ordinary declarations, the latter being excluded as made *post litem motam* (*i*).

§ 452. *Inscriptions on tombstones* (*j*), coffin-plates (*k*), mural monuments (*l*), family portraits (*m*), engravings on rings (*n*), charts of pedigree (*o*), and the like, are also admissible. Those which are proved to have been made by, or under the direction of, a deceased relative, are admitted as his declarations. But if they have been publicly exhibited, and may therefore be supposed to have been well known to the family, their publicity supplies any defect of proof that they were declarations of deceased members of the family; and they are admitted on the ground of tacit and common assent (*p*). It is presumed, though this is a presumption which is doubtless often contrary to fact (*q*), that the

(*g*) *Slaney v. Wade*, 1 Myl. & Cr. 338.

(*h*) *Fort v. Clarke*, 1 Russ. 604.

(*i*) See 1 Ph. Ev. 219, 220, and the authorities there cited.

(*j*) *Monkton v. Att.-Gen.*, 2 Russ. & My. 163; *Goodright v. Moss*, 2 Cowp. 594.

(*k*) *Chandos Peerage*, Pr. Min. 10; *Rokeby Peerage*, Pr. Min. 4; *Lovat Peerage*, Pr. Min. 77.

(*l*) *Slaney v. Wade*, 1 Myl. & Cr. 338.

(*m*) *Camoy's Peerage*, 6 Cl. & Fin. 801. (*n*) *Vowles v. Young*, 13 Ves. 144.

(*o*) *Monkton v. Att.-Gen.*, 2 Russ. & My. 163; *Goodright v. Moss*, 2 Cowp. 594.

(*p*) *Monkton v. Att.-Gen.*, 2 Russ. & My. 163; *Davies v. Lowndes*, 7 Scott, N. R. 193, per Parke, B., who observes, "The ground upon which the inscription on a tombstone or a tablet in a church is admitted, is, that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declarations would be evidence; where a pedigree hung up in the family mansion is received, it is on the ground of its recognition by the members of the family."

(*q*) Some remarkable mis-statements on monuments are mentioned in 1 Ph. Ev. 222, and note 4.

relatives of a family would not permit an erroneous inscription to remain ; and that a person would not knowingly wear a ring which bore a mis-statement upon it (*r*). Doubts appear to have been entertained at Nisi Prius respecting the admissibility of an inscription on a tombstone in a burial ground for *dissenters* (*s*) ; but it is submitted that such doubts are wholly groundless ; for not only has this very species of evidence been admitted by the House of Lords in peerage claims (*t*), but inscriptions on *foreign* monuments have also been received (*u*).

§ 453. Mural and other funereal inscriptions are proveable by *copies*, or other secondary evidence, as has been already shown (*v*). Their value as evidence depends much on the authority under which they were set up, and the distance of time between their erection and the events they commemorate (*w*) ; and if parol testimony of their contents be offered, on the ground that the original monuments are destroyed or effaced, the Court will not be satisfied, unless the prior existence of the monuments, and the genuineness of the inscriptions, be established in the very strongest manner that the circumstances of the case will admit (*x*). The ease with which evidence of this nature can be manufactured, and the difficulty of disproving it so as to fix the witnesses with perjury, show the necessity of enforcing this rule with more than ordinary strictness.

§ 454. Though the publicity of a document or inscription is a strong fact from which a family *recognition* of its truth may be presumed, yet a similar presumption may arise from other circumstances ; and, therefore, if a document, though privately kept,

(*r*) Per Lord Erskine, in *Vowles v. Young*, 13 Ves. 144.

(*s*) *Whittuck v. Waters*, 4 C. & P. 375.

(*t*) *Say and Sele Peerage*, Serj. Hill's Collect. in Linc. Inn Library, vol. 26, p. 173.

(*u*) *Hastings Peerage*, Pr. Min. 197.

(*v*) Ante, § 323, and see *Tracy Peerage*, 10 Cl. & Fin. 164, 165 ; *Roscommon and Leigh Peerages*, cited, *Hubback, Ev. of Succession*, 692 ; *Slaney v. Wade*, 1 Myl. & Cr. 338 ; 7 Sim. 695, S.C. cor. V. Ch.

(*w*) *Athenry Peerage*, Pr. Min. 45 ; *Vaux Peerage*, Pr. Min. 129 ; *Fitzwalter Peerage*, Pr. Min. 34.

(*x*) *Tracy Peerage*, 10 Cl. & Fin. 154, 181, 182, 189, 192.

is clearly proved to have been preserved by members of the family as an authentic memorial of their pedigree, it will be receivable in evidence without proof of its origin (*y*). The mere production, however, of a document from among the family archives (*x*), and, *a fortiori*, its production from a museum, or other public place of deposit (*a*), will not be sufficient to render it admissible, without proof that it was made or recognised by some member of the family.

§ 455. The question how far a pedigree, purporting to have been *compiled*, either wholly or in part, *from registers* and other documents which are *not shown to have been lost*, is admissible, has been lately much discussed. The point arose in the case of *Davies v. Lowndes* (*b*), where a Welch pedigree, which was proved to be in the handwriting of one of the ancestors of the demandant, was offered in evidence, it being produced from the proper custody. The document traced the genealogy of the family from a remote and almost fabulous antiquity, and brought down the descent to the immediate cotemporary relatives of the writer. At the foot of it was a memorandum in these words: "Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another, to Thomas Lloyd, Esq., of Cwm Gloyne, this 4th day of July, A.D. 1733, by his loving kinsman, Wm. Lloyd." The counsel for the demandant contended that the entire document was admissible, or at least such parts of it as showed the relationship of those persons who were described by the framer as living, and who might therefore be presumed to be personally known to him; but the Court of Common Pleas rejected the whole, apparently on the ground that the memorandum bore upon the face of it a sort of certificate, that the statement in the pedigree was merely secondary evidence of existing originals from which it was compiled, and that the absence of those originals was not accounted for; and that if any part of the pedigree was derived from legitimate sources, viz. personal

(*y*) *Vaux Peerage*, Pr. Min. 62; *Camoy's Peerage*, 6 Cl. & Fin. 801—803.

(*z*) *Fitzwalter Peerage*, Pr. Min. 44; *Lovat Peerage*, Pr. Min. 81.

(*a*) *Chandos Peerage*, Pr. Min. 11.

(*b*) 5 Bing. N. C. 167; 7 Scott, 21, S.C.

knowledge or family tradition, it did not appear distinctly which was such part, and therefore the whole was inadmissible (c). The case was then brought before the Exchequer Chamber, and the conclusion at which that Court arrived, after much doubt and full consideration, was that part, if not all, of the pedigree was receivable in evidence. Lord Denman, in pronouncing the judgment of the Court, observes, that "a pedigree, whether in the shape of a genealogical tree or map, or contained in a book, or mural or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is this admitted? It may be that the simple act of recognition of the document, and consequent acknowledgment of the relationship stated in it, by a member of the family, is some evidence of that relationship, *from whatever sources his information may have been derived*, because he was likely, from his situation, to inquire into the truth of such matters, and, from his means of knowledge, to ascertain it" (d). His lordship, after referring to the language of Lords Brougham (e) and Cottenham (f), and of the Vice-Chancellor of England (g), as giving great countenance to the opinion, that the recognition by a relative of a statement of relationship is evidence of the truth of that statement, adds, "if this be a correct view of the law, the pedigree in question was admissible, because it was certainly acknowledged by Wm. Lloyd to be correct." The judgment then continues thus. "But the reason why a pedigree, when made or recognised by a member of a family, is admissible, may be, that it is presumably made or recognised by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased member of what the latter knew, or heard from other members who lived before his time. And if so, it may well be contended, that, if the facts rebut that presumption, and show that no part of the pedigree

(c) Per Lord Denman, in *Davies v. Lowndes*, 7 Scott, N. R. 211; 6 M. & Gr. 525, S.C.

(d) 7 Scott, N. R. 211, 212; 6 M. & Gr. 525, 526, S.C.

(e) *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 156.

(f) *Slaney v. Wade*, 1 Myl. & Cr. 355.

(g) *Slaney v. Wade*, 7 Sim. 611.

was derived from proper sources of information, then the whole of it ought to be rejected ; and so also if there be some, but an uncertain and undefined part, derived from improper sources. But when the framer speaks of individuals, whom he describes as living, we think the reasonable presumption is that he knew them, and spoke of his own personal knowledge, and not from reference to registers, wills, monumental inscriptions, and family records, or history ; and consequently, to that extent, the statements in the pedigree are derived from a proper source, and are good evidence of the relationship of those persons" (h).

§ 456. *Armorial bearings*, whether carved on wood, painted on glass, engraved on monuments or seals, or otherwise emblazoned, are also admissible in cases of pedigree ; not only as tending to prove that the person who assumed them was of the family to which they of right belonged, but as illustrating the particular branch from which the descent was claimed, or as showing, by the impalings or quarterings, the nature of the blazonry, or the shape of the shield, what families were allied by marriage, or what members of the family were descended from an illegitimate stock, or were maidens, widows, or heiresses (i). The value of this evidence depends almost wholly upon its antiquity ; and as, since the Revolution (j), the heralds have exercised no authority in correcting usurpation, the use of armorial bearings subsequently to that date is entitled to but little, if any, weight as evidence of genealogy (k). When proof of this nature is offered, some officer of the Herald's College should be in attendance, to explain the meaning of the occult science (l).

(h) 7 Scott, N. R. 213 ; 6 M. & Gr. 527, S.C.

(i) Harl. MS. 1386, 6141 ; *Hervey v. Hervey*, 2 W. Bl. 877 ; *Chandos Peerage*, Pr. Min. 6, 24, 37, 40, 49 ; *Huntingdon Peerage*, by Bell, 280 ; Att.-Gen.'s Rep. 359, S.C. ; *Hastings Peerage*, Pr. Min. 313 ; Co. Lit. 27, a ; *Fitzwalter Peerage*, Pr. Min. 49 ; *Camoy's Peerage*, Pr. Min. 58 ; 1 Sid. 354.

(j) The date of the last Herald's visitation was 1686, and of the first was 1528. See Hubback, *Ev. of Succession*, 542.

(k) 1 Ph. Ev. 224 ; Hubback, *Ev. of Succession*, 696.

(l) See *Chandos Peerage*, Pr. Min. 6, 24, 37, 40, 49. Besides the different species of evidence enumerated above, recourse may occasionally be had to the Herald's books, inquisitions post mortem, parish books, registers, &c. ; but as these are admissible not as hearsay evidence, but as public documents, the law respecting them will be discussed in another part of this work.

CHAPTER X.

OF ANCIENT POSSESSIONS.

§ 457. A THIRD EXCEPTION to the rule rejecting hearsay evidence is allowed in cases of *ancient possession*, and in favour of the admission of *ancient documents* in support of it. In matters of private right, not affecting any public or general interest, hearsay is, as we have seen (*z*), generally inadmissible. But the admission of ancient documents, purporting to constitute part of the *transactions* themselves, to which, as acts of ownership or of the exercise of right, the party against whom they are produced is not privy, stands on a different principle. It is true, on the one hand, that the documents in question consist of evidence, which is not *proved* to be part of any *res gestæ*, because the only proof of the transaction consists in the documents themselves; and these may have been fabricated, or, if genuine, may never have been acted upon. Their effect, too, if admitted in evidence, is to benefit persons connected in interest with the original parties to the documents, and from whose custody they have been produced. But, on the other hand, such documents always accompany, and form a part of, every legal transfer of title and possession by act of the parties; and there is, also, some presumption against their fabrication, where they refer to co-existing subjects by which their truth might be examined (*a*). On these grounds, therefore, as well as because such is generally the only attainable evidence of ancient possession, this proof is admitted, under the qualifications which will be stated.

§ 458. Since the value of these documents depends mainly on their having been at least contemporaneous with, if not part of, the act of transfer, care is *first* taken to ascertain their *genuineness*; and

(*z*) Ante, § 423.

(*a*) 1 Ph. Ev. 273; 1 St. Ev. 67; *Clarkson v. Woodhouse*, 5 T. R. 413, n., per Lord Mansfield.

this may in general be shown *prima facie*, by proof that they come from the *proper custody*. As this proof is by no means confined to documents tendered in support of ancient possession, but is required in most cases where deeds, papers, or writings are rendered admissible by any rule of law without strict proof of their authenticity, it becomes highly important to explain, with as much precision as possible, the legal meaning of the words "proper custody." We therefore propose, in this place, to illustrate the subject once for all, by referring to the leading decisions which bear upon it; and we cannot preface our observations better than by citing the language used by Chief Justice Tindal in the House of Lords, while pronouncing the opinion of the judges in the important case of the Bishop of Meath *v.* The Marquis of Winchester (b). "Documents," said his Lordship, "found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody, which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various, that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases" (c).

(b) 3 Bing. N. C. 200—202; 10 Bligh, 462—464, S. C. See also *Doe v. Samples*, 8 A. & E. 154, per Patteson, J. *Doe v. Phillips & 2 D. 158*

(c) For the American authorities, see *Barr v. Gratz*, 4 Wheat. 213, 221; *Winn v. Patterson*, 9 Peters, 663—675; *Clarke v. Courtney*, 5 Peters, 319, 344;

§ 459. Thus, on the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate (c). So, a manuscript found in the Herald's Office, enumerating the possessions of a dissolved monastery (d); a curious manuscript book, entitled the "*Secretum Abbatis*," preserved in the Bodleian Library at Oxford, and containing a grant to an abbey (e); an old grant to a priory, brought from the Cottonian MSS. in the British Museum (f); and two ancient writings, purporting respectively to be an endowment of a vicarage and an inspeximus of the endowment under the seal of a bishop, both of which had been purchased at a sale as part of a private collection of manuscripts (g); have been held to be inadmissible, the possession of the documents being unconnected with the interest in the property (h). In the case of *Randolph v. Gordon* (i) this doctrine was carried to its extreme limit. There, the defendant, who was grandson of a former rector, produced a book, which purported to be the book of such rector; but as he did not show that he had found it among his grandfather's papers, or that it had come into his possession in a legitimate manner, it was rejected.

§ 460. On the other hand, the poor-house of a union has been considered not an improper repository for the documents of any parish within the union (j); and an old chartulary of a dissolved abbey has been admitted, when found in the possession of the owner of part of the abbey lands, though not of the *principal proprietor* (k). The strictly proper custody for such a document as this last would have been the Augmentation Office (l); and as between the different proprietors of the abbey lands, it might

Jackson v. Laroway, 3 Johns. Cas. 283, approved in *Jackson v. Luguere*, 5 Cowen, 221, 225; *Hewlett v. Cock*, 7 Wend. 371, 374; *Duncan v. Beard*, 2 Nott & M'C. 400; *Middleton v. Maas*, id. 55. (c) 3 Bing. N. C. 201, per Tindal, C. J.

(d) *Lygon v. Strutt*, 2 Anstr. 601. (e) *Michell v. Rabbetts*, cited 3 Taunt. 91.

(f) *Swinerton v. Marquis of Stafford*, 3 Taunt. 91.

(g) *Potts v. Durant*, 3 Anstr. 789.

(h) *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 201, per Tindal, C. J.

(i) 5 Price, 312. See also *Manby v. Curtis*, 1 Price, 225.

(j) *Slater v. Hodgson*, 2 Sess. Cas. 488.

(k) *Bullen v. Michel*, 2 Price, 413. (l) Per Lord Redesdale, 4 Dow, 321.

naturally be supposed to have been deposited with the largest; still the Court held, that its actual place of custody was one, where it might reasonably be expected to be found (*m*). So, an old book of a collector of tithes would be equally well authenticated, whether produced from the custody of the successor, or executor, of the incumbent, or from the hands of the successor of the collector (*n*). So, also, an unproved will, more than thirty years old, disposing of real and personal estate, and produced from the custody of a younger son of the testator, who, in common with his brothers, derived a benefit under it, has been admitted, though it was contended that it should have been deposited in the ecclesiastical court of the diocese (*o*). Where an expired lease was produced from the custody of the lessor, and proof was given that he had received it from a former occupier of the demised premises, who had paid for several years the precise rent reserved by it, and who, subsequently to the expiration of the term, had procured it from two strangers who claimed no interest in it, the Court held the deed to be admissible, without proof in what manner it had come into the hands of these strangers; because, by the act of giving it up to the occupier, they admitted his right to the possession of it, and were, consequently, presumed to have held it on his account (*p*). Again, a case stated for counsel's opinion by a deceased bishop, respecting his right of presentation to a living, has been admitted against a subsequent bishop of the same see, on a question touching the same right, though the paper was not found in the public registry of the diocese, but among the private family documents of the descendants of the former bishop (*q*). So, where a mortgagee in fee brought an action of ejectment, and the defendant's case was, that the mortgagor, his father, had, previously to the mortgage, conveyed the estate to trustees in settlement, reserving to himself only a life interest, the Court permitted the son to put in the deed of settlement, it being more than thirty years old, though it was produced from among the papers of his late father, against whom

(*m*) *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 201, 202, per Tindal, C. J. (*n*) *Id.*; referring to *Jones v. Waller*, 2 Gwill. 346.

(*o*) *Doe v. Pearce*, 2 M. & Rob. 240, per Coleridge, J.

(*p*) *Rees v. Walters*, 3 M. & W. 527.

(*q*) *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 183, 202, 203.

its provisions were intended to operate ; and though it was strongly urged that the trustees or their representatives were the parties entitled to its custody ; and the more especially so, as by the deed having been permitted to remain with the settlor, he had been enabled to practise a fraud on the mortgagee (*r*).

§ 461. It appears to be a question of some doubt whether the custody of a document must be proved by a sworn witness, when it purports on its face to belong to the party who tenders it in evidence. In one or two settlement cases, the respondents have been permitted to produce old certificates, which purported to have been granted to them by the appellants, without giving any account respecting their custody (*s*) ; but, in the case of *Evans v. Rees*, where, on a question of boundary, the plaintiff's counsel proposed to read certain manor-books without proving the custody whence they came, on the ground that they belonged to the lord, who was admitted to be the real plaintiff, the Court held that they could not be read ; Mr. Justice Coleridge observing, that unless some one was sworn for the purpose of proving their custody, they might have been procured from a grocer's shop (*t*). If, however, the witness producing the document can swear that he received it from the representative of the person originally entitled to it, as a paper which had belonged to such person, it seems that this evidence will, in ordinary cases, be sufficient, without calling the representative himself to explain how he became possessed of the document (*u*).

§ 462. It has been urged by an able writer on the law of evidence, that in order to render ancient documents admissible, proof, if possible, must be given of some *act done* with reference to them, and that where the nature of the case does not admit of such proof, acts of modern enjoyment must at least be shown (*v*). This doctrine, however, would seem to be advanced in somewhat too bold a manner, and to be unsupported by the current of

(*r*) *Doe v. Samples*, 8 A. & E. 151 ; 3 N. & Per. 254, S. C. See also *Bertie v. Beaumont*, 2 Price, 307 ; *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 774, 775.

(*s*) *R. v. Ryton*, 5 T. R. 259 ; *R. v. Netherthong*, 2 M. & Sel. 337.

(*t*) 10 A. & E. 151, 154.

(*u*) *Earl v. Lewis*, 4 Esp. 1, per Heath, J.

(*v*) 1 Ph. Ev. 276, 278.

modern decisions; for although it is perfectly true that the mere production of an ancient document, unless supported by some corroborative evidence of acting under it, or of modern possession, would be entitled to little, if any, weight, still there appears to be no strict rule of law, which would authorise the judge in withdrawing the deed altogether from the consideration of the jury:—in other words, the absence of proof of possession affects merely the *weight*, and not the *admissibility*, of the instrument. Thus, in *Rogers v. Allen*, where, in order to prove a prescriptive right of fishery as appurtenant to a manor, ancient licenses to fish in the locus in quo, which appeared on the court-rolls, and were granted by former lords in consideration of certain rents, were tendered in evidence, Mr. Justice Heath, after argument, held that they were admissible without any proof of the rents having been paid; but he added that, “to give them any *weight*, it must be shown that in latter times payments had been made under licences of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in” (*w*). So, in the case of the Duke of Bedford *v. Lopes, Bart.*, which was an action brought to try the title to the bed of a river, after proof of a grant from Henry VIII., two counterparts of leases were produced from the Duke’s muniment room, comprehending the soil in question. No payment by a tenant was proved, nor any modern act of ownership; but Lord Denman admitted the instruments as coming from the right custody, observing that there was no circumstance in the case which threw suspicion upon them, and that “the absence of other kinds of proof was mere matter of observation” (*x*). Again, in one of the late ejectments brought by Lord Egremont (*y*), it became necessary to show that the land in question had been part of the estate of the lessor’s ancestor, Sir William Wyndham; and in order to establish this fact, there was

(*w*) 1 Camp. 309, 311.

(*x*) Cited in argument, 3 Q. B. 623.

(*y*) *Doe v. Fulman*, 3 Q. B. 622, 626. See further on this subject, *Clarkson v. Woodhouse*, 5 T. R. 413, n., per Lord Mansfield; *Brett v. Beales*, M. & M. 418, per Lord Tenterden; *Doe v. Passingham*, 2 C. & P. 444, per Burrough, J.; *Rancliffe v. Parkyns*, 6 Dow, 202, per Lord Eldon; *McKenire v. Fraser*, 9 Ves. 5; *Jackson v. Laroway*, 3 Johns. Cas. 283, 287; *Jackson v. Luquere*, 5 Cowen, 221, 225; *Jackson v. Lamb*, 7 id. 431; *Barr v. Gratz*, 4 Wheat. 213, 221; *Hewlett v. Cock*, 7 Wend. 371, 373, 374.

produced from the muniment room of the property which had descended from Sir William, what appeared to be a counterpart of a lease of this land made by him ; but it purported to be executed only by the lessee, and there was no proof given of actual possession under it. The Court of Queen's Bench, after consulting with some of the other judges, held that this deed was admissible in evidence.

§ 463. Under these qualifications, *ancient documents*, purporting to be a *part of the transactions to which they relate*, and not a *mere narrative* of them, are receivable as evidence that those transactions actually occurred. And though they are spoken of as hearsay evidence of ancient possession, and as such are said to be admitted in exception to the general rule ; yet they seem rather to be parts of the *res gestæ*, and therefore admissible as original evidence, on the principle already discussed. An ancient deed, by which is meant one more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead ; and, if it be found in the proper custody, and be corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of property therein mentioned ; because this is the usual course of such transactions. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statue may be made out from an existing *torso*, or a perfect skeleton from the fossil remains of a part.

CHAPTER XI.

OF DECLARATIONS AGAINST INTEREST.

§ 464. A FOURTH EXCEPTION to the rule rejecting hearsay evidence is allowed in favour of *declarations made by persons since deceased against their pecuniary or proprietary interest* (a). The ground upon which this evidence is received, is *the extreme improbability of its falsehood*. The regard which men usually pay to their own interests is considered a sufficient security against any wilful misstatement, and affords also a reasonable inference that the declarations or entries were not made under any mistake of fact, or want of information on the part of the declarant. The danger of any fraud in the statement will be still less dreaded, if we reflect, that the evidence is not *receivable till after the death* of the declarant, and that if the opponent can show that the statement was made with any sinister motive, it will at once be rejected. The ordinary tests of truth, afforded by the administration of an oath and by cross-examination, are certainly here wanting; but their place is in some measure supplied by the circumstances of the declarant; and the inconveniences that would result from the exclusion of evidence, having such guarantees for its accuracy in fact and its freedom from fraud, are rightly considered much greater in general, than any which are likely to be experienced from its admission (b).

§ 465. In order to render declarations against interest admissible as such, it must be shown that the declarant is *dead* (c); and the mere fact that he has absconded abroad in consequence of a criminal charge, or that he is otherwise out of the power of the

(a) *Sussex Peerage*, 11 Cl. & Fin. 103—114; *Higham v. Ridgway*, 10 East, 109; 2 Smith's Leading Ca. 183, S. C.; id. 193, n.; *Short v. Lee*, 2 Jac. & Walk. 464, 488, per Plumer, M. R.

(b) 1 Ph. Ev. 294.

(c) *Phillips v. Cole*, 10 A. & E. 106, 111, per Lord Denman; *Spargo v. Brown*, 9 B. & C. 935; *Smith v. Whittingham*, 6 C. & P. 78. See ante, § 444, and post, § 492.

party to produce as a witness, will not be sufficient (*d*). It would seem, also, from many of the cases, that the declarant must be shown to have had a competent, if not a peculiar, *knowledge* of the facts, which form the subject matter of the declaration (*e*); indeed, so recently as in the Sussex Peerage claim, the rule has been so laid down (*f*). In all these cases, however, the "law" was "taken for granted" (*g*); and in *Crease v. Barrett*, where the question was expressly raised, the Court of Exchequer after argument held, "that it was not necessary that the deceased person should have his own knowledge of the fact stated; that, if the entry charged himself, the whole of it became admissible against all persons, and that the absence of such knowledge went to the weight, and not to the admissibility, of the evidence" (*h*).

§ 466. It was long a matter of doubt in Westminster Hall, whether the absence of all interest to misrepresent, coupled with peculiar knowledge in the declarant, would not render his declarations admissible after his death (*i*); but it is now finally determined, first, that the statement or entry must be *against the interest* of the person making it (*j*); and secondly, that the interest must be of a *pecuniary or proprietary nature* (*k*). These points were decided in the Sussex Peerage case, where, in order to prove the marriage of the Duke of Sussex and Lady Augusta Murray, statements made by the clergyman, since deceased, who had married them at

(*d*) *Stephen v. Gwenap*, 1 M. & Rob. 120, per Alderson, J.

(*e*) *Higham v. Ridgway*, 10 East, 122, per Bayley, J.; *Marks v. Lahee*, 3 Bing. N. C. 419, per Tindal, C. J.; 420, per Park, J.; 421, per Vaughan, J.; *Barker v. Ray*, 2 Russ. 76, per Lord Eldon; *Short v. Lee*, 2 Jac. & Walk. 475, 488, 489, per Plumer, M. R.

(*f*) 11 Cl. & Fin. 112, per Lord Brougham and Lord Denman.

(*g*) As to which, see per Lord Denman in *O'Connell v. The Queen*, 11 Cl. & Fin. 373.

(*h*) 1 C. M. & R. 925; 5 Tyrw. 464, 465, S. C.

(*i*) See per Lord Hardwicke in *Glynn v. Bank of England*, 2 Ves. Sen. 38; per Le Blanc, J., in *Higham v. Ridgway*, 10 East, 120, 121; per Bayley, J., in *Gleadow v. Atkin*, 1 Cr. & Mee. 424; per Lord Ellenborough in *Roe v. Rawlings*, 7 East, 290; and *Daly v. Wilson*, Milw. Eccl. Ir. R. temp. Radcliffe, 658—660.

(*j*) *Berkeley Peerage*, Pr. Min. 655, cited and confirmed in *Sussex Peerage*, 11 Cl. & Fin. 108, 109.

(*k*) *Sussex Peerage*, 11 Cl. & Fin. 103—114; explained and acted upon by Lord Denman, in *Davis v. Lloyd*, 1 C. & Kir. 276.

Rome, were tendered in evidence, on the ground that they were clearly against his interest, inasmuch as they related to an act which rendered him *liable to prosecution* while living, or which, at least, he believed to be *illegal*. Lord Chancellor Lyndhurst, in declaring his opinion that this evidence should be rejected, observed, "It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true, that because, while living, a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his death. These are not correlative nor corresponding propositions" (l). Lord Brougham also added, "To say, if a man should confess a felony for which he would be liable to prosecution, that, therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced" (m).

§ 467. The Courts will not weigh with nice scales the amount of the pecuniary interest, but will admit every entry which, at the time when it was made, *completely* charged the maker to *any extent*. But an incomplete charge will not be sufficient; and therefore an entry in the following form, "April 4th.—A. came as a servant, to have for the half year 2*l.*," was held to be inadmissible as a declaration against interest, the Court considering it merely as a memorandum of an agreement, which must be supposed to have been made on fair terms, and was consequently as much in favour of the maker's interest as against it. If the master had to pay for the services, the servant had to perform them. Mr. Justice Coleridge observed, that "this was not an entry against the party's interest, unless the mere making of a contract be so; and if that were the case, the existence of a contract would be against the interest of both parties to it" (n).

§ 468. Whether, with reference to this exception, and to that which relates to declarations made in the course of duty or

(l) 11 Cl. & Fin. 110.

(m) Id. 111, 112. This case overrules *Standen v. Standen*, Pea. R. 45.

(n) R. v. Worth, 4 Q. B. 132, 139.

business, the term "declaration" includes a mere *verbal* statement, is a question still undecided. In the case of *Fursdon v. Clogg* (*o*), the point was much discussed, the one side insisting that the cases went no further than to admit written entries, and the other contending, with apparently much more reason (*p*), that, although verbal statements might be entitled to less weight with the jury than such as were written, yet the law of England recognised no distinction whatever between matter by parol and in writing, except where the writing was by deed. The Court of Exchequer, according to Mr. Starkie (*q*), intimated a present opinion in favour of the admissibility of the evidence; but this fact is not mentioned in the report of the case, and it there simply appears that, after taking time to consider, the judges declined to pronounce any decision on the subject, their judgment resting wholly on another point (*r*).

§ 469. Whatever may be the fate of this question, there can be no doubt but that the term declaration, as applied to the exception we are now considering, embraces *all written statements*, whether made *at the time of the fact declared, or on a subsequent day* (*s*), though the exception is most frequently exemplified by entries in books of account. Where these are books of collectors of taxes, stewards, bailiffs, or receivers, subject to the inspection of others, and in which the first entry is generally of money received, charging the party making it, they are clearly within the principle of the exception (*t*); but it has been extended still further, to include *entries in private books* also, though retained within the custody of their owners; their liability to be produced in courts of law on

(*o*) 10 M. & W. 572, 574, 575.

(*p*) See *Davies v. Pierce*, 2 T. R. 53; *Holloway v. Rakes*, cited *id.* 55; *Strode v. Winchester*, 1 Dick. 397; *Ivat v. Finch*, 1 Taunt. 141. In the *Sussex Peerage* case a verbal declaration was tendered in evidence, as having been made against the interest of the declarant, but neither the counsel nor the judges questioned its admissibility on the ground of its not having been in writing. 11 Cl. & Fin. 103—114.

(*q*) 1 St. Ev. 613.

(*r*) 10 M. & W. 575, 576.

(*s*) *Doe v. Turford*, 3 B. & Ad. 898, per Parke, B.; *Short v. Lee*, 2 Jac. & Walk. 475, per Plumer, M. R.

(*t*) *Barry v. Bebbington*, 4 T. R. 514; *Goss v. Watlington*, 3 B. & B. 132; *Whitnash v. George*, 8 B. & C. 556.

notice, and the possible chance of their contents becoming known through accident, being deemed sufficient security against fraud (*u*) ; and the entry not being admissible, unless it *charges the party making it* with the receipt of money on account of a third person, or *acknowledges the payment of money* due to himself ; in either of which cases it would be evidence against him, and therefore is considered as sufficiently against his interest to bring it within this exception.

§ 470. No valid objection can be taken to the admissibility of an entry, which charges the person making it with receiving money for another, on the ground that such entry forms only a part of a *general debtor and creditor account*, the *balance of which is in favour of the receiver* (*v*) ; for, if an action were brought against the receiver by his employer, that part of the account which charged the receiver would be evidence against him, while the entries which showed his discharge, though not absolutely inadmissible for him, would, as compared with the entries against his interest, be entitled to very little weight (*w*) ; and even if this were not so, the admission of the receipt of money would still be against his interest, as the balance in his favour would thereby be diminished to the extent of the sum admitted (*x*). Besides, a man is little likely to charge himself for the mere purpose of getting a discharge (*y*) ; and as almost all entries, which are tendered in evidence as being declarations against interest, are inserted in accounts containing items on both sides, the objection, if it were allowed to prevail, would strike at the very root of the exception we are discussing (*z*).

§ 471. Whether an entry made by a party, acknowledging the payment of money as due to himself, will be admissible as a decla-

(*u*) *Higham v. Ridgway*, 10 East, 122, per Bayley, J. ; *Roe v. Rawlings*, 7 East, 291, per Lord Ellenborough ; *Middleton v. Melton*, 10 B. & C. 317.

(*v*) *Rowe v. Brenton*, 3 M. & Ry. 267, 268 ; *Williams v. Geaves*, 8 C. & P. 592, per Patteson, J. ; *R. v. Worth*, 4 Q. B. 134, per Coleridge, J. ; *Clark v. Wilmot*, 1 You. & Col. N. C. C. 53.

(*w*) See 2 Smith's Lead. Ca. 195, 196.

(*x*) See 8 C. & P. 594, per Ludlow, Serj., *arguendo*.

(*y*) See per Littledale, J., in *Rowe v. Brenton*, 3 M. & Ry. 268.

(*z*) See per Lord Tenterden, in *id*.

ration against interest, in cases where *such entry is itself the only evidence of the charge of which it shows the subsequent liquidation*, is a question of more difficulty, and the authorities on the subject are highly conflicting. On the one hand, two *Nisi Prius* decisions may be cited, which seem expressly to negative the admissibility of such evidence. In the first case (*z*) it became necessary to show that a mortgagee, through whom the plaintiff claimed, had repaired the premises in dispute; and for this purpose, the plaintiff produced a receipted bill for the repairs, in the handwriting of a deceased carpenter, which had been found among the mortgagee's papers. An objection was raised to the reception of this paper as not containing any statement against the interest of the carpenter; since, though it showed that his demand had been paid, it furnished the only evidence that such a demand had ever existed. Mr. Justice Littledale rejected the evidence, observing, that "the cases had gone quite far enough." In the other case (*a*) the evidence tendered was of a similar nature, excepting only that, instead of being a bill and receipt, it was an entry in a deceased tradesman's book, showing that he had done certain work, and had been paid for so doing. Mr. Baron Gurney refused to admit this evidence, apparently relying on the authority of *Doe v. Vowles*. On the other hand, Lord Denman (*b*) and Mr. Baron Parke (*c*) appear, on separate occasions, to have admitted such entries, and the latter very learned judge is stated to have expressly disapproved of *Doe v. Vowles* (*d*), saying that he thought it contrary in principle to *Higham v. Ridgway* (*e*). On examining, however, the case of *Higham v. Ridgway*, it scarcely seems to furnish a safe guide on the subject; for there it was proved by evidence *aliunde*, that the service charged for in the account had in fact been performed; and although Lord Ellenborough first lays down the general doctrine, that "the evidence was admissible upon the broad principle on which receivers' books have been admitted,—namely, that the entry made was in prejudice of the party making it" (*f*),—he afterwards, in two different

(*z*) *Doe v. Vowles*, 1 M. & Rob. 261.

(*a*) *Doe v. Burton*, 9 C. & P. 254.

(*b*) *R. v. Hendon*, cited, *arguendo*, in 9 C. & P. 255.

(*c*) *R. v. Lower Heyford*, cited, 2 Smith's Lead. Ca. 194, n.

(*d*) *Ante*, n. (*c*).

(*e*) 10 East, 109.

(*f*) 10 East, 117.

parts of his judgment adverts to the fact, that the work, for which the charge was made, was proved to have been done by other evidence (*g*). Regarding then the question independently of this case, we are inclined to offer an opinion in favour of the view taken by Lord Denman and Mr. Baron Parke; for, although it has been urged by those advocating the rejection of the evidence, that, while that part of an entry which militates in the writer's own favour stands unconfirmed, suspicions may be entertained that the whole statement is a fiction (*h*); yet, when we consider how extremely improbable it is, that a tradesman should, without any assignable motive, enter a false claim on one side of his book, and admit its having been satisfied on the other; and when we further reflect, that the requiring corroborative proof of the claim must tend to embarrass the trial by raising collateral issues, and that the very impossibility of obtaining such proof is often the sole cause, which renders it necessary to have recourse to the entry at all; we certainly arrive at the conclusion, that the danger of admitting such entries is much less than that which would result from their rejection.

§ 472. The case of *Higham v. Ridgway* (*i*), though it throws but little light on the subject discussed in the preceding section, is highly important, as showing that entries may be received in evidence of *collateral and independent matters*, which, though forming part of the declaration, are not in themselves against the interest of the declarant. There, the fact in issue was the age of a child; and in order to show on what day he was born, the book of the accoucheur, who had attended his mother in her confinement, was produced, and his charge for such attendance on a day specified being therein marked as *paid*, the entry was admitted as evidence of the date of the birth. Lord Ellenborough, in pronouncing judgment, observes, "It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged" (*j*). So, in *Doe v. Robson* (*k*), the entry in a

(*g*) 10 East, 117, 119.

(*h*) 2 Smith's Lead. Ca. 194.

(*i*) 10 East, 109.

(*j*) Id. 117.

(*k*) 15 East, 32.

deceased attorney's book, of charges paid for a lease as drawn on a certain day, was held to be evidence that the lease was drawn on that day. In a later case (*l*), while the Court intimated an opinion, that if the point were *res nova*, it would be more reasonable to hold, that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and on what account,—thus giving it the effect only of verbal proof of the same payment; yet, they acknowledged that the authorities had gone beyond that limit, and that the entry of a payment against the interest of the party making it, had been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it. In that case, A. B. and C. had made a joint and several promissory note for 800*l.*, and a partial payment had been made by A., which was indorsed by the payee upon the note in these terms,—“Received of A. the sum of 280*l.*, on account of the within note, *the 800*l.* having been originally advanced to C.*” An action having been brought by A. to recover contribution from B. “as a co-surety,” it was held that, as the payee was dead, the indorsement was admissible evidence of the whole statement contained in it, and was consequently evidence, not only of the payment of the money, but of the person on whose account it was paid as being the principal debtor; leaving the effect of such proof to be determined by the jury.

§ 478. Again, in the case of *Marks v. Laheè* (*m*), the plaintiff, in order to prove a tender and refusal, offered in evidence two entries, which had been made by a deceased clerk of his attorney in the day-book of the office. By the first, the clerk acknowledged the receipt of 100*l.* from his employer, for the purpose of making a tender to the defendant. The second entry was as follows: “Re Colnaghi, attending Mr. Laheè; tendering him 100*l.* for each of the plates, and the etching of the Queen separately; when he declined to let me have same, and said he had no objection to deliver up the impressions, upon payment of the expenses of making them.” An objection was taken to the admissibility of

(*l*) *Davies v. Humphreys*, 6 M. & W. 153, 166.

(*m*) 3 Bing. N. C. 408; 4 Scott, 137, S. C.

the second entry, on the ground that it did not charge the party making it, but rather discharged him, as showing he had fulfilled his duty; that the second entry must be taken by itself, because the first did not prove the tender; and being so taken, there was nothing to show that the clerk did not tender his own money; in which case the entry contained nothing to charge him. The objection, however, was overruled, and Chief Justice Tindal observed, that if an action had been brought by the employer against the clerk for money had and received, the entry would have been material evidence to show that he had received 100*l.*, and had not disposed of it according to his instructions; so that it remained in his hands to be accounted for to the employer. In such an action the employer could not have relied on the first entry alone; but must have further shown that the object, for which the money was placed in the clerk's hands, had not been attained (*n*). The case of *Stead v. Heaton* (*o*) carries this doctrine to the extreme verge of the law (*p*). There, in order to establish the existence of a customary payment, two entries in a parish book were put in. The first stated the custom, and the second, which was written on the same page, was as follows: "Received of Haworth, who this year disputed *this* our ancient custom, but afterwards paid it, 8*l.*" The Court held that both entries were admissible, the latter as charging the parish officers with the receipt of the money, the former as immediately preceding the latter, and being referred to in it (*q*).

§ 474. It does not follow from the preceding cases, that because a document contains entries against interest, it will be admissible in proof of *independent matters*, which appear as separate items unconnected with such entries, and which, consequently, need not be read in order to explain them (*r*). For instance, in the case of *Knight v. The Marquis of Waterford* (*s*), the accounts of a deceased steward were tendered in evidence, with the view of

(*n*) 3 Bing. N. C. 419.

(*o*) 4 T. R. 669. See also *Mayor of Exeter v. Warren*, 5 Q. B. 773.

(*p*) Per Alderson, B., in *Knight v. Waterford*, 4 You. & Col. Ex. 294.

(*q*) See *Musgrave v. Emerson*, 16 Law J., N. S. Q. B. 175.

(*r*) Per Lord Lyndhurst, in *Rudd v. Wright*, cited 1 Ph. Ev. 314, 315; 4 You. & Col. Ex. 294.

(*s*) 4 You. & Col. Ex. 283, 294, 295.

showing that former lords of the manor had been liable to pay poor-rates on the tithes. On one side of these accounts the steward acknowledged the receipt from a tenant of rent for tithes; and on the other side was an entry in discharge of the former item, by allowing the tenant a certain sum for poor-rates on the tithes. Mr. Baron Alderson rejected this second entry, on the ground that it was not directly connected with the first item, though made about the same time; but his Lordship added that, if the amount charged had been stated to be a sum less by the deduction of the opposite side of the account, it might then possibly have been admissible, on the authority of *Stead v. Heaton*.

§ 475. In order to render declarations against interest admissible, it is not necessary, as was formerly thought (*t*), that the declarant should have been competent, if living, to testify to the facts contained in the declaration (*u*). Neither is it material, so far at least as regards the *admissibility* of declarations, whether the matters stated therein are or are not proveable by living witnesses who might have been called (*v*). Moreover, no objection can be taken to an account, in which a deceased agent charges himself with the receipt of money, on the ground that it does not appear by the account itself for whom the sums were received; provided it can be shown aliunde that they were in fact collected for a third person (*w*).

§ 476. Where accounts are produced as the declarations of a deceased person charging himself, they will be equally admissible, if they be written by him either wholly (*x*), or in part (*y*), though they be not signed; or if they be signed by him, though they be written by a stranger (*z*). So, also, no objection can be raised to their admission, though they be neither written nor signed by the deceased,

(*t*) See per Bayley, J., in *Higham v. Ridgway*, 10 East, 123.

(*u*) *Gleadow v. Atkin*, 1 Cr. & M. 410, 423, 424; *Short v. Lee*, 2 Jac. & Walk. 489.

(*v*) *Middleton v. Melton*, 10 B. & C. 317, 327, per Parke, J.; ante § 444.

(*w*) *Rowe v. Brenton*, 3 M. & Ry. 268—270.

(*x*) *Id.* 267—269.

(*y*) *Doe v. Colcombe, C. & Marsh.* 155, per Coleridge, J.

(*z*) *Doe v. Stacey*, 6 C. & P. 139, per Tindal, C. J.

provided it can be directly proved that they were written by his authorised agent, or if this fact can be indirectly established, as, for instance, by showing that the deceased subsequently adopted the accounts as his own, and delivered them in at an audit (a); nor does it signify in such case, whether the party who actually wrote the accounts be alive or dead at the time of the trial, though, in the former event, his non-production may be matter of observation to the jury (b). If, however, the account be neither written nor signed, nor can be proved to have been authorised or adopted by the deceased person made chargeable thereby, it cannot be received; and therefore where a rental, in which a deceased steward was debited with the receipt of certain payments, was written by a party since dead, styling himself clerk to such steward, the Court refused to receive it as a declaration against the interest of the steward, as no parol evidence had been given to show that he ever employed the writer to make the entries; and it was equally inadmissible as made against the interest of the clerk, because it did not purport to charge *him* (c). After the lapse of thirty years, the handwriting of the account need not be proved, provided the book containing it be produced from the proper custody (d).

§ 477. Where the evidence consists of entries made by persons acting for others, in the capacity of agents, stewards, or receivers, *some proof of such agency* is generally required, previous to their admission; but here a distinction has been taken, to the effect that, where the office is *public* and must exist, the law will presume that a person, who acts in it, has been regularly appointed; but that where it is merely *private*, some preliminary and independent evidence must in general be adduced of the existence of the office, and of the appointment of the particular agent or incumbent (e). It seems that the mere antiquity of the book containing the entry affords no sufficient ground for dispensing with this preliminary

(a) *Doe v. Hawkins*, 2 Q. B. 212; 1 G. & D. 551, S. C.; *Doe v. Mobbs, C. & Marsh.* 1; *Mayor of Exeter v. Warren*, 5 Q. B. 773.

(b) 2 Q. B. 217, per Patteson, J.

(c) *Baron de Rutzen v. Farr*, 4 A. & E. 53; 5 N. & M. 617, S. C.

(d) *Wynne v. Tyrwhitt*, 4 B. & A. 376; *Mayor of Exeter v. Warren*, 5 Q. B. 773.

(e) *Short v. Lee*, 2 Jac. & Wal. 467, 468, 474, 475, per Sir Thos. Plumer, M. R.

proof, and therefore entries have been rejected for want of it, though apparently made as much as fifty, seventy, and even one hundred and sixty years before the trial (*f*). In *Davies v. Morgan*, where the entry bore date 1678, Mr. Baron Bayley, in refusing to admit it in evidence, said, "The character of the evidence must be established before the entry is read; you cannot read it to show the position of the party making it; that must be proved aliunde" (*g*). So, in *Short v. Lee*, Sir Thomas Plumer said, with reference to a book seventy years old, which purported to have been kept by a tithe-collector named Beale, "If the writings of persons not invested with the proper characters were received, nothing could be more dangerous to property. Suppose that Beale was not the person authorised to collect the tithes, but nevertheless had for some purpose made these entries; then if after his death the book purporting to be a collector's book was to be evidence to prove that he was collector, and his being collector was to prove the entries to be correct, the consequence would be, that the rights of the rector on the one hand, or those of the parishioners on the other, would be exposed to the greatest danger, and perhaps from the writing of a person having a contrary interest" (*h*). Still, if ancient books come from the proper repository, slight proof of the official character of the writer will usually be sufficient to warrant their admission; and if they contain strong *internal* evidence of their actually being what they purport to be, they may, it seems, on that ground alone be submitted to the jury (*i*).

§ 478. Under the head of declarations against *proprietary interest*, may be classed the statements made by persons while in possession of land, explanatory of the character of their possession; and it is now well settled that such declarations, *if made in disparagement of the declarant's title*, are receivable, not only as original admissions against himself and all persons who claim title through him (*j*),

(*f*) *Manby v. Curtis*, 1 Price, 225; *Short v. Lee*, 2 Jac. & Wal. 466, 467; *Davies v. Morgan*, 1 C. & Jer. 590, 591.

(*g*) 1 C. & Jer. 591.

(*h*) 2 Jac. & Wal. 467, 468.

(*i*) *Doe v. Thynne*, 10 East, 206, 210; *Brune v. Thompson*, C. & Marsh. 36—39, per Lord Denman; *Mayor of Exeter v. Warren*, 5 Q.B. 773. See ante, § 419.

(*j*) *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 780, 784, 785; *Doe v. Pettett*,

but also as evidence for or against strangers (*k*). Whether in this latter event they are to be regarded as primary or as secondary evidence, and therefore whether they are admissible in the lifetime of the declarant, or only in cases where his death can be proved, are points which do not appear to have been distinctly decided. In most of the cases where the evidence has been received, the declarant was dead (*l*); but on two occasions, at least, the evidence was admitted, though the declarant was living (*m*). The only ground on which it can be contended that these declarations are receivable as original evidence, appears to be that they are statements accompanying the act of possession, and as such constituting parts of the *res gestæ*; but this argument proves too much, as the effect of it would be to let in all the declarations of the occupier, whether in disparagement or in *support* of his title; an extension of the rule which, however consistent it may be with principle, is certainly not warranted by judicial decisions (*n*). The safest course therefore is to regard these declarations as merely secondary evidence, and consequently as only receivable when the declarant is dead; and further to consider that their admissibility depends on the simple ground that they are made against the interest of the declarant (*o*).

5 B. & A. 223; *Doe v. Austin*, 9 Bing. 41. For the American authorities connected with this subject, see *West Cambridge v. Lexington*, 2 Pick. 536; *Little v. Libby*, 2 Greenl. 242; *Rankin v. Tenbrook*, 6 Watts, 388, 390; *Jackson v. Bard*, 4 Johns. 230, 234; *Weidman v. Kohr*, 4 Serg. & R. 174; *Gibblehouse v. Strong*, 3 Rawle, R. 437; *Davis v. Campbell*, 1 Iredell, R. 482; *Crane v. Marshall*, 4 Shepl. 27.

(*k*) *Carne v. Nicoll*, 1 Bing. N. C. 430; 1 Scott, 466, S. C.; *Doe v. Jones*, 1 Camp. 367; *Davies v. Pierce*, 2 T. R. 53; *Walker v. Broadstock*, 1 Esp. 458; *Doe v. Rickarby*, 5 Esp. 4; *Peaceable v. Watson*, 4 Taunt. 16; *Doe v. Coulthred*, 7 A. & E. 235.

(*l*) *Carne v. Nicoll*, 1 Bing. N. C. 430; 1 Scott, 466, S. C.; *Doe v. Jones*, 1 Camp. 367; *Davies v. Pierce*, 2 T. R. 53; *Peaceable v. Watson*, 4 Taunt. 16; *Doe v. Coulthred*, 7 A. & E. 235; *Doe v. Pettett*, 5 B. & A. 223.

(*m*) *Walker v. Broadstock*, 1 Esp. 458, per Thomson, B.; *Doe v. Rickarby*, 5 Esp. 4, per Lord Alvanley.

(*n*) See *Doe v. Wainwright*, 8 A. & E. 700, 701.

(*o*) See *Phillips v. Cole*, 10 A. & E. 111, where Lord Denman, in pronouncing the judgment of the Court, observes, "It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interest of those who make them."

§ 479. It should here be remembered that possession is *prima facie* evidence of seisin in fee-simple (*o*); and consequently any declaration by the possessor that he is tenant in tail, or for life, or for years, or by sufferance, as it makes strongly against his own interest, might safely be received in evidence, on account of its probable truth (*p*). It matters not whether the declaration be made verbally (*q*), or in writing (*r*), or by deed (*s*), or in an answer to a bill in Chancery (*t*), for the same principle applies in all these cases; but it must relate to matters, either within the declarant's own knowledge, or on which he has himself formed an opinion; and therefore an answer to a bill in Chancery, narrating what the declarant has heard *another person state* respecting his title, is not admissible to defeat his estate, at least if he does not add that he believes such statement to be true (*u*).

§ 480. It is difficult to fix with precision how far these declarations are admissible as evidence of the facts contained in them. They have been received to show the name of the landlord under whom the declarant held (*v*); as also that the tenement which he occupied was freehold and not copyhold (*w*); but, in strictness, it would seem that they ought to be confined to the simple proof of the interest which the declarant enjoyed in the premises. It appears that, in all these cases, it must be proved that the declarant was actually in possession of the land in question; since otherwise his declaration that he has a limited interest therein, may be regarded in the light rather of a statement in his own favour than of one against his interest (*x*). Still, slight evidence on this head

(*o*) Ante, § 97.

(*p*) *Chambers v. Bernasconi*, 1 Cr. & Jer. 457, per Lord Lyndhurst; *Peaceable v. Watson*, 4 Taunt. 17, per Sir James Mansfield, C. J.; *Crease v. Barrett*, 1 C. M. & R. 931; 5 Tyrwh. 473, S. C., per Parke, B.

(*q*) *Carne v. Nicoll*, 1 Bing. N. C. 430; 1 Scott, 466, S. C. *Brown v. Wade's Case* 9 2. 12

(*r*) *Doe v. Jones*, 1 Camp. 367.

(*s*) *Doe v. Coulthred*, 7 A. & E. 235.

(*t*) *Lord Trimblestown v. Kemmis*, 9 Cl. & Fin. 779, 780.

(*u*) *Lord Trimblestown v. Kemmis*, 9 Cl. & Fin. 780, 784—786, by the Lords, confirming the unanimous opinion of the judges.

(*v*) *Peaceable v. Watson*, 4 Taunt. 16; *Holloway v. Rakes*, cited by Buller, J., in *Davies v. Pierce*, 2 T. R. 55; *Doe v. Green*, 1 Gow, R. 227.

(*w*) *Doe v. Jones*, 1 Camp. 367.

(*x*) See *Crease v. Barrett*, 1 C. M. & R. 919, 931; 5 Tyrwh. 458, 473, S. C.

will, it seems, suffice; and therefore where a person was seen felling timber in a wood, this was held to be a sufficient act of ownership, though probably he was in fact a mere labourer, to raise a presumption that he was possessed of the fee, and consequently to let in any statement made by him as to who was the actual proprietor (*y*).

§ 481. In applying this rule, care must be taken to distinguish between statements made by an occupier of land in disparagement of his own title, and such declarations as merely go to abridge or encumber the estate itself; since, though the former are receivable, the latter will be rejected. For instance, if an occupier state that he is only tenant for life, this, after his death, will be admissible evidence against a stranger; but if he admit that the property was intersected by a public highway, or that a neighbour had an easement in the land in question, such admission will only bind himself and those who claim under him, and will be inadmissible to establish the highway or the easement as against his landlord or a stranger (*z*). The grounds for this distinction are obvious; for, though it is scarcely possible to imagine any inducement, which will lead a person, possessed of premises in fee, to admit that he is only tenant, many causes might induce a tenant to acknowledge the existence of an easement or a highway, which might be either not inconvenient, or even absolutely beneficial to him (*a*).

§ 482. There is another class of entries, the admissibility of which in evidence is regarded by some persons as anomalous (*b*); by some, as governed by the rule which admits old leases, rent-rolls, surveys, &c. (*c*); and by others, as falling within the principle of the present exception (*d*); we allude to entries contained in the *books of deceased rectors or vicars*, which have long been admitted *in favour of their successors, or of parties claiming the same interest*

(*y*) *Doe v. Arkwright*, 5 C. & P. 575, per Parke, B.

(*z*) *R. v. Bliss*, 7 A. & E. 550; *Scholes v. Chadwick*, 2 M. & Rob. 507, per Cresswell, J.; *Tickle v. Brown*, 4 A. & E. 378, per Patteson, J.

(*a*) See *R. v. Bliss*, 7 A. & E. 551, per Lord Denman; *Daniel v. North*, 11 East, 375, per Le Blanc, J.

(*b*) *Outram v. Morewood*, 5 T. R. 123, per Lord Kenyon.

(*c*) *Stobart v. Dryden*, 1 M. & W. 617, per Parke, B. (*d*) 1 Ph. Ev. 308, 309.

as the maker of the entries (d). Sir Thomas Plumer, in a case before him (e), said: "It is admitted, that the entries of a rector or vicar are evidence for or against his successors. It is too late to argue upon that rule, or upon what gave rise to it; whether it was the *cursus Scaccarii*, the protection of the clergy, or the peculiar nature of property in tithes. It is now the settled law of the land. *It is not to be presumed, that a person, having a temporary interest only, will insert a falsehood in his book, from which he can derive no advantage.* Lord Kenyon has said, that the rule is an exception; and it is so; for no other proprietor can make evidence for those who claim under him, or for those who claim in the same right and stand in the same predicament. But it has been the settled law as to tithes, as far back as our research can reach. We must therefore set out from this as a datum; and we must not make comparisons between this and other corporations. No corporation sole, except a rector or vicar, can make evidence for his successor." The rule, however, extends to admit the books of ecclesiastical corporations aggregate (f), and, as it would seem, those also of lay impropiators in fee; though these last would certainly be open to considerable suspicion, since a lay impropiator in fee, having a permanent interest to advance, might possibly be induced to make evidence for his heirs (g). With respect to all these books, too, though the law admits them as evidence, juries will do well not to place implicit reliance on the statements they contain; for, in point of fact, the clergy, like members of all other professions, are, or at least *have been*, occasionally actuated by a strong esprit de corps, and the entries in their books evince not unfrequently a commendable leaning in favour of the rights of the church. General observations have sometimes been made respecting these books, which may seem to authorise the admission of any kind of statement contained in them. But such books will be rejected unless the entries contain receipts of money or ecclesiastical dues, or are, in other respects, apparently prejudicial to the pecuniary or proprietary interests of the makers (h). And proof

(d) See *Daly v. Wilson*, Milw. Eccl. Ir. R. temp. Radcliffe, 658—660.

(e) *Short v. Lee*, 2 Jac. & Walk. 477, 478.

(f) *Id.* 476—479.

(g) *Id.* 478—480, and cases there cited.

(h) 1 Ph. Ev. 309; *Ward v. Pomfret*, 5 Sim. 475.

will be required, as in other cases, that the writer was authorised to receive the money stated, and is actually dead; and that the document came from the proper custody (i).

§ 483. It remains only to notice a class of cases, which seems to fall within the principle we are now considering more naturally than any other, though one eminent writer on the law of evidence has treated it in connection with entries made in the course of business (k); we allude to those cases where the *indorsement* by the payee of the *payment of interest* or of *part payment* of the principal, on a bond, bill of exchange, or other negotiable security, used to be tendered in evidence by *his representatives* after his death, in order to bar the Statute of Limitations, or to rebut the presumption of payment that would otherwise have arisen from lapse of time. Now, it is obvious, that, although such indorsements, if made before the demand became stale or was affected by the Statute of Limitations, would be against the interest of the payee, inasmuch as they would prevent him from recovering the amount of the sums so indorsed; yet, if they were made at a subsequent period, the creditor would be under the influence of a far stronger counter-vailing interest; because, by admitting a partial payment, he would keep alive his right to recover the remainder of the debt. Hence, it became necessary to show at what time the indorsement was really made; for if it were made before the creditor's remedy was impaired by lapse of time, it was received (l); if after that period, it was rejected (m). Still the question remained, how was the time to be proved? Might it be inferred from the instrument itself, or was it necessary to establish the fact by extrinsic evidence? And on this difficult point much contrariety of opinion prevailed (n).

§ 484. Having thus stated briefly the old law relative to this subject, let us see how it has been affected by statutable enactments;

(i) *Gresley*, Ev. 224; *Carrington v. Jones*, 2 Sim. & Stu. 135, 140; *Perigal v. Nicholson*, Wightw. 63.

(k) 1 Ph. Ev. 330—335.

(l) *Searle v. Lord Barrington*, 2 Str. 826; 8 Mod. 278; 2 Lord Raym. 1370; 3 Brown, P. C. 593, S. C.; *Bosworth v. Cotchett*, 1 Ph. Ev. 333.

(m) *Turner v. Crisp*, 2 Str. 827; *Glynn v. Bank of England*, 2 Ves. Sen. 38, 43.

(n) See cases referred to, post, § § 485—488.

and here it will first be observed, that, so far as *notes, bills,* and other writings, subject to the operation of the old English Statute of Limitations (*o*), or the corresponding Irish act (*p*), are concerned, the matter has been set at rest by Lord Tenterden's Act (*q*), which enacts in the 3rd sect. that "no indorsement or memorandum of any payment written or made after" the first of January, 1829 (*r*), "upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes." It will next be remarked, with respect to *bonds* and other *specialties*, that the old doctrine of presumption of payment from lapse of time has been rendered nugatory in England by 3 & 4 Will. 4, c. 42, § 3, and in Ireland by 3 & 4 Vict., c. 105, § 32, which respectively enact, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, &c., shall be commenced and sued within twenty years after the cause of such actions or suits; while § 5 of the English, and § 34 of the Irish, Act contain provisoes, that, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, the person entitled to such action may bring it for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid; and the plaintiff may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of the statute. There is no clause in either of these acts, corresponding with the 3rd section of Lord Tenterden's Act, and therefore it seems clear that, provided the point be properly raised by the pleading, the acknowledgment of the debt afforded by the payment of interest or part payment of principal may, in the case of bonds and other specialties, be still proved in the same manner as formerly; that is, by producing the

(*o*) 21 Jac. 1, c. 16.

(*q*) 9 Geo. 4, c. 14.

(*p*) 10 Car. 1, sess. 2, c. 6.

(*r*) § 10.

document and showing that it bears indorsements of such payments, even though these indorsements were written or adopted by the creditor himself, through whom the plaintiff claims. The only difference between the old and new law is, that, whereas this evidence was formerly admissible in answer to a plea of payment, it is now received in support of a replication of acknowledgment by the defendant, where the original demand has been met by a plea of the statute.

§ 485. It becomes then important to solve the question whether it be, or be not, necessary to prove by evidence dehors the instrument itself, that the indorsement, which is put in for the purpose of establishing payment of interest, or part payment of principal, was written at a time when it was against the interest of the creditor to make it; or, in other words, that it was written before his right of action was barred by the statute; and here, notwithstanding some apparent authorities to the contrary, we submit that this question must be answered in the affirmative. The principle of admitting such indorsements in favour of parties *in privity* with the persons making them, is an anomaly in the law, which cannot be supported by any of the reasons whereon the admissibility of rectors' books is made to rest (*s*), and which, so far as regards parol instruments, has been expressly reprobated by the legislature (*t*). It is therefore not unreasonable to contend that the courts should require strict proof of the time when the indorsements were really made, before they consent to admit them in evidence. In ordinary cases, the law may safely presume that a document was written at the time it bears date; but we have already seen (*u*) that there is an exception to this rule, where a note signed by a bankrupt is put in by his assignees to support the petitioning creditor's debt. Now, why is this exception allowed? Clearly, because it is so much to the interest of the petitioning creditor to support the fiat, that he might collusively induce the bankrupt to ante-date the instrument, by means of which his debt is to be established. Then, does not this reasoning apply equally to the indorsements under discussion, which, if

(*s*) Ante, § 482.

(*t*) 9 Geo. 4, c. 14, § 3.

(*u*) Ante, § 110. See also another exception noticed ante, § 394.

really made *within* twenty years from the date of the bond, are received, because, being in such case entries against the interest of the obligee, they are presumed to be true ; but, if made *beyond* the twenty years, are rejected, because, after the lapse of that time, it would be so obviously to the advantage of the obligee to revive, by their means, the remedy barred by the statute, that the law presumes they are false? But surely it is as easy to fabricate a date, as to fabricate an indorsement, of which the date forms part, and it seems a strange mode of checking such fraudulent practices to say to an obligee, "Your remedy on the bond is barred by the statute, and therefore we will not believe any statement you now make respecting your receiving interest from the obligor ; but carry on your deceit one step further, and add to your indorsement a date, which will give it the semblance of having been made while your remedy was unimpaired, and then, at your death, your representatives may recover against the obligor."

§ 486. The authorities on this subject lay down no decisive rule. In the case of *Searle v. Lord Barrington*, extrinsic evidence *was* given of the time when the indorsements were made (*v*), though that fact is only mentioned loosely by Mr. Brown (*w*), and is not noticed by the other reporters (*x*). In *Bosworth v. Cotchett* (*y*) it seems, indeed, to have been unsuccessfully contended before the House of Lords, that unless evidence were given, independent of the note, to show when the indorsements were made, they could not be received (*z*) ; but as that case is not reported, and is noticed so shortly by our text writers (*a*) that the grounds of the decision cannot be ascertained, it will scarcely be considered as a binding authority. In *Sanders v. Meredith*, in addition to an indorsement signed by the obligee, a witness was called,

(*v*) Per Bayley, B., in *Gleadow v. Atkin*, 1 Cr. & M. 421, 424, stating the result of his own researches.

(*w*) 3 Brown, P. C. 594, where the reporter says that "other circumstantial evidence" was given to prove that the bond had not been satisfied.

(*x*) 2 Str. 826 ; 8 Mod. 278 ; 2 Lord Raym. 1370.

(*y*) Judgment in Dom. Proc. 6th May, 1824.

(*z*) Per Vaughan, B., in *Gleadow v. Atkin*, 1 Cr. & M. 428. His Lordship was of counsel in *Bosworth v. Cotchett*.

(*a*) 1 Ph. Ev. 333 ; 3 St. Ev. 824. In this last work the case is cited as *Part v. Cotchett*.

who proved actual payment of the interest (*b*). The case of *Gleadow v. Atkin* (*c*) throws but little light upon the subject. There the payment of interest by the obligor to a stranger was proved; and in order to show that this payment had been made on account of the bond, the executors of the obligee relied on an indorsement in his handwriting, whereby he acknowledged that the principal sum due on the bond was trust-money, to which the stranger was entitled. This indorsement bore the same date as the bond itself, and was countersigned by the attesting witness of the bond. The Court held that it was admissible in evidence, and rightly so; because, in the first place, many circumstances concurred to show that the indorsement was written on or about the day of the date, and next, it signified little when it was written, as it was equally against the interest of the obligee at all times (*d*).

§ 487. The only modern case which directly supports the presumption in question is that of *Smith v. Battens* (*e*). There the point was, whether an indorsement of interest on a promissory note, which bore date before the 1st of January, 1829, when Lord Tenterden's Act came into operation, could be admitted in evidence for the purpose of taking the case out of the statute, without some extrinsic proof of the time when it was actually written; and Mr. Justice Taunton, apparently on the authority of *Bosworth v. Cotchett* (*f*), received it, observing that, "in the absence all evidence to the contrary, he should assume that it was written at the time it bore date." Now, although this case was subsequently cited with approbation by the Court of Common Pleas (*g*), as supporting the general doctrine that documents are presumed to have been written at the time they bear date, we humbly submit, that with respect to the particular question before the Court, the case is not law. To throw on the defendant the burthen of proving negatively that the indorsement was not written on the day of the date, was in fact to shut the door upon all inquiry into the matter; because, as the note continued in the hands of the payee

(*b*) 3 M. & Ry. 116.

(*c*) 1 Cr. & M. 410.

(*d*) See per Bayley, B., 1 Cr. & M. 417.

(*e*) 1 M. & Rob. 341.

(*f*) Cited in the Report as *Parr v. Crotchett*.

(*g*) In *Anderson v. Weston*, 6 Bing. N. C. 302, 303.

or his representatives, it was scarcely possible for the maker to ascertain at what time any indorsement was written upon it.

§ 488. This view of the subject is much confirmed by the language of Lord Ellenborough in *Rose v. Bryant* (A), where the administrator of an obligee of a bond, for the purpose of meeting certain direct evidence of payment in the year 1794, proposed to read an indorsement, which appeared to have been made on the bond in the following year, and which acknowledged the receipt of interest and part of the principal. In refusing to admit this evidence, his Lordship said, "I think you must prove that these indorsements were on the bond at, or recently after, the times when they bear date, before you are entitled to read them. Although it may seem at first sight against the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such indorsements were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest." Perhaps the safest rule that can be laid down on this subject is, that if the indorsement *appears by its date* to have been written within the twenty years, the question may be left to the jury, under all the circumstances of the case, whether it were *really* so written (i); the law raising no presumption either way, and the Courts not interfering with the decision at which the jury shall arrive.

(A) 2 Camp. 321.

(i) See per Vaughan, B., in *Gleadow v. Atkin*, 1 Cr. & M. 426.

CHAPTER XII.

DECLARATIONS IN THE COURSE OF OFFICE OR BUSINESS.

§ 489. IN many of the cases cited in the preceding chapter, the admissibility of the statements and entries tendered in evidence rested on the ground, not only of their being prejudicial to the pecuniary or proprietary interests of the parties making them, but of their having been made *in the ordinary course of business or professional employment*. The class of cases, therefore, which forms the FIFTH EXCEPTION to the rule rejecting hearsay evidence, consists of such declarations as fall within this last category. The considerations which have induced the Courts to recognise this exception appear to be principally these;—that, in the absence of all suspicion of sinister motives, a fair presumption arises, that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth (a).

§ 490. One of the earliest reported cases (b), illustrative of this subject, was an action of assumpsit for beer sold and delivered, the

(a) *Poole v. Dicaa*, 1 Bing. N. C. 653, per Tindal, C. J.; 1 Ph. Ev. 319; 1 St. Ev. 348, 349.

(b) *Price v. Torrington*, 1 Salk. 285; 2 Lord Raym. 873; 1 Smith's Lead. Ca. 139, S. C.; *Pitman v. Maddox*, 2 Salk. 690; 2 Lord Raym. 732, S. C.; *Rowcroft v. Basset*, Pea. Add. R. 199, 200, per Le Blanc, J.

plaintiff being a brewer. In order to prove the delivery, it was first shown that, in the usual course of the plaintiff's business, the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered during the day, which he entered into a book kept for that purpose, to which the draymen set their hands. An entry in this book, which stated the delivery of the beer in question, and was signed by a drayman, whose signature and check were proved, was then put in, and Lord Holt held that it was sufficient evidence to maintain the action. So, where the question was whether a notice to quit had been served upon a tenant, the indorsement of service upon a copy of the notice, made by the attorney who served it, was held after his death to be admissible in proof of that fact; it being shown to be the ordinary course of business in his office to preserve copies of such notices, and to indorse the service thereon (c). So, also, the books of the messenger of a bank, and of the clerk of a notary, have been held admissible to prove the dishonour of a bill of exchange by the acceptor, and notice to the indorser, upon proof that the entries were made in the usual routine of business (d); and, upon like proof, the letter-book of a merchant plaintiff, in which a deceased clerk had inserted what purported to be the copy of a letter to the defendant, and had further made a memorandum stating that he had sent the original letter, has been admitted as evidence of the fact of sending, as also of the contents of the letter, the defendant having been served with notice to produce the original (e).

§ 491. Though the cases cited above have established beyond dispute the existence of the exception we are now discussing, several of the judges have, of late years, evinced great *disinclination to extend its principle* beyond the limits strictly warranted by

(c) *Doe v. Turford*, 3 B. & Ad. 890; *R. v. Cope*, 7 C. & P. 726, 727, per Lord Denman.

(d) *Sutton v. Gregory*, Pea. Add. R. 150, per Lord Kenyon; *Poole v. Dicus*, 1 Bing. N. C. 649; 1 Scott, 600; 7 C. & P. 79, S. C.; *Nichols v. Webb*, 8 Wheat. 326; *Welch v. Barrett*, 15 Mass. R. 380; *Halliday v. Martinett*, 20 Johns. 168; *Butler v. Wright*, 2 Wend. 369; *Hart v. Williams*, id. 513; *Nichols v. Goldsmith*, 7 Wend. 160.

(e) *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, id. 379. See also *Champneys v. Peck*, 1 Stark. R. 404.

antecedent decisions. Thus, in an action for the price of coals, which had been sold at the pit's mouth, an entry was rejected, which appeared to have been made in the following manner. In the ordinary course of business, it was the duty of one of the workmen at the pit, named Harvey, to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ a man named Baldwin to make entries in the books from his dictation. Baldwin read over these entries every evening to the foreman. At the time of the trial, Harvey and the foreman were dead, and Baldwin was called to produce this book, with the view of proving thereby the delivery of the coal in question; but the Court held that it was inadmissible (*f*). The ground of this decision appears to have been, that, although the entries, being made under the foreman's direction, might be regarded as made by him, yet, inasmuch as he had no *personal knowledge* of the facts stated in them, but derived his information at second-hand from the workman, there was not the same guarantee for the truth of the entries as might be found in *Price v. Torrington*, *Doe v. Turford*, and *Poole v. Dicas*; in all of which cases the party making the entry had himself done the business, a memorandum of which he had inserted in his book. It seems more difficult to reconcile the case of *Davis v. Lloyd* (*g*) with sound principle, or with previous decisions. There, in order to show that a Jew was of age, it was proved that Jewish children were circumcised on the eighth day from their birth, and that it was the duty of the chief rabbi to perform this rite, and to make an entry thereof in a book kept at the synagogue. Upon proof that the rabbi was dead, this book was tendered in evidence; but Lord Denman, after consulting Mr. Justice Patteson, rejected it, though it does not appear on what grounds. In another case (*h*) it became necessary to show that a contract of service had been for less than a year; and, in order to do this, proof was given that the employer, who was dead, had in the course of his business been in the habit of hiring farm servants, and that his practice, when he did so, was to enter the time and terms of such hiring in a book kept by him for that purpose. This book, which contained entries of the service

(*f*) *Brain v. Preece*, 11 M. & W. 773.

(*g*) 1 C. & Kir. 275.

(*h*) *R. v. Worth*, 4 Q. B. 132.

in question, and showed that the servant had been engaged for half a year only, was tendered in evidence; but the Court held that it was inadmissible, on the ground that, although it might be the practice of the master to make such entries, it was not his *duty* to do so.

§ 492. In many respects the rules which regulate the reception of the species of evidence under discussion, are the same as those which prevail with respect to declarations against interest. For instance, the death (*i*), the handwriting, and the official character, of the person who made the entry must be proved; and it should further appear that he had no motive to mis-state. In some particulars, however, there is a marked distinction between the two classes of cases.

§ 493. First, in order to render admissible entries made in the course of office or business, they must, unlike declarations against interest, be proved to have been made *contemporaneously with the acts which they relate*. This distinction was expressly pointed out by Mr. Baron Parke in *Doe v. Turford*. "It is to be observed," said the learned judge, "that in the case of an entry against interest, proof of the handwriting of the party, and his death, is enough to authorise its reception; at whatever time it was made it is admissible; but in the other case [of an entry made in the course of business], it is essential to prove that it was made at the time it purports to bear date: it must be a contemporaneous entry" (*k*). In using the word "contemporaneous," it is not meant that the entry must have been made at the immediate time of the occurrence; but it will be sufficient if made within so short a time after, as reasonably to be considered part of the transaction. Thus, if the business be done in the morning, and the entry be made in the evening of the same day (*l*), or perhaps even on the following morning (*m*), it will be sufficient; though, where several inter-

(*i*) See *Cooper v. Marsden*, 1 Esp. 1, per Lord Kenyon. See ante, § 465.

(*k*) 3 B. & Ad. 897, 898, cited and approved by Park, J., in *Poole v. Dicus*, 1 Bing. N. C. 654, 655.

(*l*) *Price v. Torrington*, 1 Salk. 285; *Ray v. Jones*, 2 Gale, 220; *Curren v. Crawford*, 4 Serg. & R. 3, 5.

(*m*) *Ingraham v. Bockins*, 9 Serg. & R. 285.

mediate days had elapsed, between the date of the transaction and the time of inserting an entry of it in the book, the evidence has been rejected (*n*); and in one American case, the interval of a single day was held to constitute a valid objection (*o*).

§ 494. Secondly, we have seen that declarations against interest are often admissible to prove *independent matters*, which, though forming part of the entry, are not in themselves against the interest of the declarant (*p*). A stricter rule, however, prevails with respect to official or business entries, and it has been held that "whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances" (*q*). In the case which called forth these observations, it became necessary to show in what *place* the plaintiff had been arrested; and in order to do this, a certificate of a deceased sheriff's officer, which had been returned by him to the office in the ordinary routine of his duty, and which specified, among other circumstances connected with the arrest, the spot where it took place, was tendered in evidence; but the judges of the Exchequer Chamber, before whom the question was argued on a bill of exceptions,—while they admitted, for the sake of argument, that the certificate was evidence of the arrest itself, as also of the day when it was made, since it might be necessary for the officer to make known these facts to his principal,—were all clearly of opinion that it could not be received to show the particular spot where the caption took place, that circumstance being merely collateral to the duty done (*r*). "This decision," as was afterwards observed by Mr. Justice Park, "turned on the circumstance that the sheriff's officer was going beyond the sphere of his duty when he made an entry of the *place* of arrest, and that such an entry therefore had no claim to be received as evidence of that fact" (*s*).

(*n*) Forsythe v. Norcross, 5 Watts, 432.

(*o*) Walter v. Bollman, 8 Watts, 544.

(*p*) Ante, §§ 472, 473.

(*q*) Chambers v. Bernasconi, 1 C. M. & R. 368, per Lord Denman, pronouncing the unanimous opinion of the Ex. Ch.

(*r*) Chambers v. Bernasconi, 1 C. M. & R. 347, 368; 4 Tyrwh. 531, S.C.

(*s*) Poole v. Dicas, 1 Bing. N. C. 655. See also per Tindal, C. J., id. 651.

§ 495. Some persons contend that the rule under discussion is subject to a third qualification, which certainly does not apply to declarations against interest, and which is to this effect ;—namely, that entries made in the course of office or business cannot be admitted, unless *corroborated by other circumstances which render it probable that the facts therein recorded really occurred*. This opinion seems to rest, partly on a supposed dictum of Mr. Justice Taunton (f) ; partly on a misapprehension of the rule adopted by Mr. Justice Parke, that an entry made in the course of business is admissible “where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place” (u) ; and partly on the circumstance, that, in one or two of the later cases on the subject, confirmatory evidence has in fact been adduced, and its existence has been noticed by the Court as tending to establish the correctness of the entry (v). Still, we consider that Mr. Phillipps is right in rejecting this qualification ; and we submit, with him, that, though corroborative evidence must naturally add to the *value* of entries, it cannot be deemed essential to their *admissibility* (w).

§ 496. It has further been urged that entries in the course of business will only be received, when the nature of the case is such as to render better evidence unattainable ; but this limitation of the rule has been expressly rejected in *Poole v. Dicas*, where Chief Justice Tindal, after observing that *Doe v. Turford* was no authority for the proposition, since in that case persons might have been present when the notice was served, continued thus :—“In the present case, it would operate as a great hardship to require

(f) *Doe v. Turford*, 3 B. & Ad. 898, where his Lordship is made to say, “A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that* that fact occurred, is admissible in evidence. Those corroborating circumstances must be proved ; and here many such circumstances did appear.” Mr. Phillipps suggests that the words, “the entry was made when,” have probably been omitted by accident at the place marked with the star. 1 Ph. Ev. 324.

(u) *Doe v. Turford*, 3 B. & Ad. 897.

(v) *Id.* 890, 897 ; *Poole v. Dicas*, 1 Scott, 600 ; 1 Bing. N. C. 649, 653, 654, S.C.

(w) 1 Ph. Ev. 324. See *R. v. Cope*, 7 C. & P. 726, 727, per Lord Denman.

the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application ; and if it were necessary to call all the persons who resided at the place of presentment, the expense and inconvenience would be enormous. The rejection of the evidence which has been received would be a great injury to the commercial classes, by casting an unnecessary difficulty on the holders of bills of exchange" (x).

§ 497. From the cases cited above it may be collected, that, in order to bring a declaration within the present exception, proof must be given that it was made contemporaneously with the fact which it narrates, and in the usual routine of business, by a person whose duty it was to make the whole of it, who was himself personally acquainted with the fact, who had no interest in stating an untruth, and who is since dead ; and, provided all the terms of this proposition be satisfied, it seems to be immaterial, excepting so far as regards the *weight* of the evidence, that more satisfactory evidence might have been produced, that the declaration is uncorroborated by other circumstances, or that it consists of a mere verbal statement, which has never been reduced to writing. In support of this last point no direct decision can be cited, since all the cases on the subject relate to written entries ; but, as we have before suggested (y), the law appears to recognise no valid distinction between written and verbal statements ; and in the *Sussex Peerage* case, Lord Campbell, no mean authority, expressly stated, that "where a declaration *by word of mouth*, or by writing, is made in the course of the business of the individual making it, then it may be received in evidence, though it is not against his interest" (z).

§ 498. In the United States this principle has been carried further than in England, and has been extended to *entries made by the party himself* in his own shop-books (a) ; at least, where

(x) 1 Bing. N. C. 654. The same rule prevails with respect to declarations against interest, ante, § 475. (y) Ante, § 468. (z) 11 Cl. & Fin. 113.

(a) In the following States the admission of the party's own books, and his own entries, has been either expressly permitted, or recognised and regulated, by

they were evidently contemporaneous with the facts to which they refer, and formed part of the *res gestæ*. Being the acts of the party himself, they are received with the greater caution; but still they may be seen and weighed by the jury (*b*). Though this

statute; viz. *Vermont*, (1 Tolman's Dig. 185); *Connecticut*, (Rev. Code, 1821, 93, tit. 9, § 1); *Delaware*, (stat. 25 Geo. 2, Rev. Code, 1829, p. 89); *Maryland*, as to sums under ten pounds in a year, (1 Dorsey's Laws of Maryland, 73, 303); *Virginia*, (stat. 1819, 1 Rev. Code, ch. 128, §§ 7, 8, 9); *North Carolina*, (stat. 1756, ch. 57, § 2, 1 Rev. Code, 1836, ch. 15); *South Carolina*, (stat. 1721, Sept. 20. See Stat. at Large, vol. iii., p. 799, Cooper's ed. 1 Bay, 43); *Tennessee*, (Stat. Tennessee, by Carruthers & Nicholson, 131). In *Louisiana*, and in *Maryland* (except as above), entries made by the party himself are not admitted. Civil Code of Louisiana, Art. 2244, 2245; *Johnson v. Breedlove*, 2 Martin, N. S. 506. *Herring v. Levy*, 4 Martin, N. S. 383; *Cavelier v. Collins*, 3 Martin, 188; *Owings v. Henderson*, 5 Gill & Johns. 134, 142. In all the other States they are admitted at common law, under various degrees of restriction. See *Cogswell v. Dolliver*, 2 Mass. 217; *Poulney v. Ross*, 1 Dall. 239; *Lynch v. McHugo*, 1 Bay, 33; *Foster v. Sinkler*, id. 40; *Slade v. Teasdale*, 2 Bay, 173; *Lamb v. Hart*, id. 362; *Thomas v. Dyott*, 1 Nott & McC. 186; *Burnham v. Adams*, 5 Verm. 313; *Story Conf. Laws*, §§ 526, 527.

(*b*) The rules of the several States in regard to the admission of this evidence are not perfectly uniform; but in what is about to be stated, it is believed that they concur. Before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the Court; and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded. If they appear manifestly erased and altered, they will not be admitted, until the alteration is explained, *Churchman v. Smith*, 6 Whart. 106. The form of keeping them, whether it be that of a journal or ledger, does not affect their admissibility, however it may go to their credit with the jury. *Cogswell v. Dolliver*, 2 Mass. 217; *Prince v. Smith*, 4 Mass. 455, 457; *Faxon v. Hollis*, 13 Mass. 427; *Rodman v. Hoops*, 1 Dall. 85; *Lynch v. McHugo*, 1 Bay, 33; *Foster v. Sinkler*, id. 40; *Slade v. Teasdale*, 2 Bay, 173; *Thomas v. Dyott*, 1 Nott & McC. 186; *Wilson v. Wilson*, 1 Halst. 96; *Swing v. Sparks*, 2 Halst. 59; *Jones v. De Kay*, Pennington, R. 695; *Cole v. Anderson*, 3 Halst. 68. If the books appear free from fraudulent practices, and proper to be laid before the jury, the party himself is then required to make oath, in open court, that they are the books in which the accounts of his ordinary business transactions are usually kept, *Frye v. Barker*, 2 Pick. 65. An affidavit to an account or bill of particulars is not admissible, *Waggoner v. Richmond*, Wright, Rep. 173. Whether, if the party is abroad, or is unable to attend, the Court will take his oath under a commission, is not perfectly clear. The opinion of Parker, C. J., in 2 Pick. 67, was against it; and so is *Nicholson v. Withers*, 2 McCord, 428; but in *Spence v. Saunders*, 1 Bay, 119, even his affidavit was deemed sufficient, upon a writ of inquiry, the defendant having suffered judgment by default. See also *Douglas v. Hart*, 4 McCord, 267; *Furman v. Peay*, 2 Bail. 394. He must also swear, that the articles therein charged were actually delivered, and the labour and services actually performed; that the entries were made at or about the time of the

American doctrine is not in accordance with the principles of the common law, it is with those of other systems of jurisprudence. In

transactions, and are the original entries thereof; and that the sums charged and claimed have not been paid, 3 Dane's Abr. ch. 81, art. 4, §§ 1, 2; *Cogswell v. Dolliver*, 2 Mass. 217; *Ives v. Niles*, 5 Watts, 324. If the party is dead, his books, though rendered of much less weight as evidence, may still be offered by the executor or administrator, he making oath that they came to his hands as the genuine and only books of account of the deceased; that to the best of his knowledge and belief the entries are original and contemporaneous with the fact, and the debt unpaid; with proof of the party's handwriting. *Bentley v. Hollenback*, Wright, Rep. 169; *McLellan v. Crofton*, 6 Greenl. 307; *Prince v. Smith*, 4 Mass. 455. The book itself must be the registry of business actually done, and not of orders, executory contracts, and things to be done subsequent to the entry. *Fairchild v. Dennison*, 4 Watts, 258; *Wilson v. Wilson*, 1 Halst. 95; *Bradley v. Goodyear*, 1 Day, 104, 106; *Terill v. Beecher*, 9 Conn. 344, 348, 349; and the entry must have been made for the purpose of charging the debtor with the debt; a mere memorandum for any other purpose not being sufficient. Thus, an invoice-book, and the memoranda in the margin of a blank check-book, showing the date and tenor of the checks drawn and cut from the book, have been rejected. *Cooper v. Morrell*, 4 Yeates, 341; *Wilson v. Goodin*, Wright, Rep. 219. If the book contains marks, showing that the items have been transferred to a journal or ledger, these books also must be produced. *Prince v. Swett*, 2 Mass. 569. The entries also must be made contemporaneously with the fact entered.

Entries thus made are not, however, received in all cases as satisfactory proof of the charges; but only as proof of things which, from their nature, are not generally susceptible of better evidence. *Watts v. Howard*, 7 Metc. 478. They are satisfactory proof of goods sold and delivered from a shop, and of labour and services personally performed; *Case v. Potter*, 8 Johns. 211; *Vosburg v. Thayer*, 12 Johns. 461; *Wilmer v. Israel*, 1 Browne, 257; *Ducoign v. Schreppel*, 1 Yeates, 347; *Spence v. Saunders*, 1 Bay, 119; *Charlton v. Lawry*, Martin, N. Car. Rep. 26; *Mitchell v. Clark*, ib. 25; *Easby v. Aiken*, Cooke, R. 388; and, in some States, of small sums of money. *Cogswell v. Dolliver*, 2 Mass. 217; *Prince v. Smith*, 4 Mass. 455, 3 Dane's Abr. ch. 81, art. 4, §§ 1, 2; *Craven v. Shaird*, 2 Halst. 345. The amount, in Massachusetts and Maine, is restricted to forty shillings. *Dunn v. Whitney*, 1 Fairf. 9; *Burns v. Fay*, 14 Pick. 8; *Union Bank v. Knapp*, 3 Pick. 109. But they have been refused admission to prove the fact of advertising in a newspaper, *Richards v. Howard*, 2 Nott & McC. 474; *Thomas v. Dyott*, 1 id. 186; of a charge of dockage of a vessel, *Wilmer v. Israel*, 1 Browne, 257; commissions on the sale of a vessel, *Winsor v. Dillaway*, 4 Metc. 221; labour of servants, *Wright v. Sharp*, 1 Browne, 344; goods delivered to a third person, *Kerr v. Love*, 1 Wash. 172; *Tenbrook v. Johnson*, Cox, 288; *Townley v. Woolley*, ib. 377; or to the party, if under a previous contract for their delivery at different periods, *Lonergan v. Whitehead*, 10 Watts, 249; general damages or value, *Swing v. Sparks*, 2 Halst. 59; *Terill v. Beecher*, 9 Conn. 348, 349; settlement of accounts, *Prest v. Mercereau*, 4 Halst. 268; money paid and not applied to the purpose directed, *Bradley v. Goodyear*, 1 Day, 104; a special agreement, *Pritchard v. McOwen*, 1 Nott & McC. 131, n.; *Dunn v. Whitney*,

the administration of the Roman law, the production of a merchant's or tradesman's book of accounts, regularly and fairly kept, in the usual manner, was deemed presumptive evidence (*semiplena probatio(c)*) of the justice of his claim; and in such cases, the suppletory oath of the party (*juramentum suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favour (*d*). By the law of France, too, the books of merchants and tradesmen, regularly kept, and written from day to day

1 Fairf. 9; *Green v. Pratt*, 11 Conn. 205; or a delivery of goods under such agreement, *Nickle v. Baldwin*, 4 Watts & Serg. 290; an article omitted by mistake in a prior settlement, *Punderson v. Shaw, Kirby*, 150; the use and occupation of real estate; and the like. *Beech v. Mills*, 5 Conn. 493. See also *Newton v. Higgins*, 2 Verm. 366; *Dunn v. Whitney*, 1 Fairf. 9. But after the order to deliver goods to a third person is proved by competent evidence aliunde, the delivery itself may be proved by the books and suppletory oath of the plaintiff, in any case where such delivery to the defendant in person might be so proved, *Mitchell v. Belknap*, 10 Shepl. 475. The charges, moreover, must be specific and particular; a general charge for professional services, or for work and labour by a mechanic, without any specification but that of time, cannot be supported by this kind of evidence. *Lynch v. Petrie*, 1 Nott & McC. 130; *Hughes v. Hampton*, 2 Const. Rep. 476. And regularly the prices ought to be specified; in which case the entry is *prima facie* evidence of the value. *Hagaman v. Case*, 1 South. 370; *Ducoign v. Schreppel*, 1 Yeates, 347. But whatever be the nature of the subject, the transaction, to be susceptible of this kind of proof, must have been directly between the original debtor and the creditor; the book not being admissible to establish a collateral fact. *Miffin v. Bingham*, 1 Dall. 276, per McKean, C. J.; *Kerr v. Love*, 1 Wash. 172; *Deas v. Darby*, 1 Nott & McC. 436; *Poultney v. Ross*, 1 Dall. 238.

Though books, such as have been described, are admitted to be given in evidence, with the suppletory oath of the party; yet his testimony is still to be weighed by the jury, like that of any other witness in the cause; and his reputation for truth is equally open to be questioned. *Kitchen v. Tyson*, 2 Murph. 314; *Elder v. Warfield*, 7 Harr. & Johns. 391. In some States, the books, thus admitted, are only those of shopkeepers, mechanics, and tradesmen; those of other persons, such as planters, scriveners, schoolmasters, &c. being rejected. *Geter v. Martin*, 2 Bay, 173; *Pelzer v. Cranston*, 2 McC. 328; *Boyd v. Ladson*, 4 McC. 76. The subject of the admission of the party's own entries, with his suppletory oath, in the several American States, is very elaborately and fully treated in a note to the American Ed. of Smith's *Lead. Cas.* vol. 1, p. 142, in 43 Law Library, p. 223—245.

(c) This degree of proof is thus defined by Mascardus:—"Non est ignorandum probationem semiplenam eam esse, per quam rei gestæ *fides aliqua* fit iudici; non tamen tanta ut jure debeat in pronuncianda sententia eam sequi." *De Prob.* Vol. 1, Quæst. 11, n. 1, 4.

(d) "*Juramentum (suppletivum)* defertur ubicunque actor habet pro se—aliquas

without any blank, when the tradesman has the reputation of probity, constitute a semi-proof, and with his suppletory oath, are received as full proof to establish his demand (e). The same doctrine is familiar in the law of Scotland, by which the books of merchants and others, if kept with such a reasonable degree of regularity as to be satisfactory to the Court, may be received in evidence, the party being allowed to give his own "oath in supplement" of such imperfect proof. It seems, however, that a course of dealing, or other "pregnant circumstances," must in general be first shown by evidence aliunde, before the proof can be regarded as amounting to that degree of *sempilena probatio*, which may be rendered complete by the oath of the party (f). Especial reference is here made to these laws, because it is conceived that the adoption of a somewhat similar practice in England would prove highly beneficial.

conjecturas, per quas iudex inducatur ad suspicionem vel ad opinandum pro parte actoris." Mascardus, De Prob. Vol. 3, Concl. 1230, n. 17. The civilians, however they may differ as to the degree of credit to be given to books of account, concur in opinion, that they are entitled to consideration, at the discretion of the judge. They furnish at least the *conjecturæ* mentioned by Mascardus; and their admission in evidence, with the suppletory oath of the party, is thus defended by Paul Voet, De Statutis, § 5, cap. 2, n. 9. "An ut credatur libris rationum, seu registris uti loquuntur, mercatorum et artificum, licet probationibus testium non juventur? Respondeo, quamvis exemplo perniciosum esse videatur, quemque sibi privata testatione, sive adnotatione facere debitorem. Quia tamen hæc est mercatorum cura et opera, ut debiti et crediti rationes diligenter conficiant. Etiam in eorum foro et causis, ex æquo et bono est judicandum. Insuper non admisso aliquo litium accelerandarum remedio, commerciorum ordo et usus evertitur. Neque enim omnes præsentī pecunia merces sibi comparant. Neque cujusque rei venditioni testes adhiberi, qui pretia mercium noverint, aut expedit, aut congruum est. Non iniquum videbitur illud statutum, quo domesticis talibus instrumentis additur fides, modo aliquibus adminiculis juventur." See also Hertius, De Collisione Legum, § 4, n. 68; Strykius, Tom. 7, De Sempīlenā Probat. Disp. 1, cap. 4, § 5; Menochius, De Presump. lib. 2, Presump. 57, n. 20, & lib. 3, Presump. 63, n. 12.

(e) 1 Pothier on Obl. Part iv. ch. 1, art. 2, § 4. By the Code Napoleon, merchants' books are required to be kept in a particular manner therein prescribed, and none others are admitted in evidence. Code de Commerce, Liv. 1, tit. 2, art. 8—12.

(f) Tait, Ev. 273—277. This degree of proof is there defined as "not merely a suspicion,—but such evidence as produces a reasonable belief, though not complete evidence." See also Glassford, Ev. 550; Bell's Dig. of Laws of Scot. 378, 898.

CHAPTER XIII.

OF DYING DECLARATIONS.

§ 499. A SIXTH EXCEPTION to the rule rejecting hearsay evidence is allowed in the case of *dying declarations*. The general principle on which this species of evidence is admitted, was stated by Lord Chief Baron Eyre to be this—"that they are declarations made in extremity when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice" (a). At one time an opinion prevailed that this general principle warranted the admission of dying declarations in all cases, civil and criminal (b); and it was expressly held, by respectable authorities, that the dying declarations of a subscribing witness to a forged instrument were admissible to impeach it (c). A contrary

(a) *R. v. Woodcock*, 1 Lea. C. C. 502; *R. v. Drummond*, id. 338. Our great poet, in *King John*, has put the same sentiment into the mouth of the wounded Melan, who finding himself disbelieved while announcing the intended treachery of King Lewis, exclaims:—

"Have I not hideous death within my view,
Retaining but a quantity of life;
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true,
That I must die here, and live hence by truth."—Act 5, sc. 4.

(b) It was even held that the dying declarations of a pauper respecting his settlement were admissible, though that question involved both law and fact, *R. v. Bury St. Edmunds*, Cald. 486; *Abboton v. Dunswell*, 2 Bott. 80. This doctrine is now properly exploded. See *R. v. Abergwilly*, 2 East, 63; *Stobart v. Dryden*, 1 M. & W. 626.

(c) *Wright v. Littler*, 3 Burr. 1255; 1 W. Bl. 349, S. C., per Lord Mansfield; stating, however, as reported in Blackstone, that no general rule could be drawn

doctrine however has since prevailed (*d*) ; and it appears now to be settled law, both in England and America, that evidence of this description is admissible, as such, in no civil case,—and, in criminal cases, only in the single instance of *homicide*, “where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration” (*e*).

§ 500. Thus, on a trial for robbery, the dying declaration of the party robbed has been rejected (*f*) ; and where a prisoner was indicted for administering drugs to a woman, with intent to procure abortion, her statements in extremis were held to be inadmissible (*g*). So, where a party, convicted of perjury, had obtained a rule nisi for a new trial, and pending the proceedings, had shot the prosecutor, the Court of King’s Bench, on cause being shown against the rule, rejected an affidavit of the dying declarations of the latter, as to the transaction out of which the prosecution for perjury arose (*h*). After stating these strong cases, it seems scarcely necessary to add, that, in an action of ejectment, the Court refused to receive the dying declarations of a servant of the party last seised, as to the relationship of such party with the lessor of the plaintiff (*i*) ; and that in Ireland, on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who on his death-bed confessed that he had committed the crime (*k*). Upon one occasion the judges appear to have entrenched somewhat upon this rule ; for a prisoner being indicted for poisoning his master, and it appearing that a maid servant had taken some of the same

from the admission of the evidence in that particular case ; *Anon.* per Heath, J., cited with apparent approbation by Lord Ellenborough, in *Aveson v. Lord Kinnaid*, 6 East, 195, 196, and in *Bishop of Durham v. Beaumont*, 1 Camp. 210, and explained by Bayley, J., in *Doe v. Ridgway*, 4 B. & A. 55.

(*d*) See *Stobart v. Dryden*, 1 M. & W. 624—627, where the cases cited in the preceding note were virtually overruled. See ante, § 384.

(*e*) *R. v. Mead*, 2 B. & C. 608 ; 4 D. & R. 120, S. C. ; 1 East, P. C. 353 ; *Wilson v. Boerem*, 15 Johns. 286.

(*f*) *R. v. Lloyd*, 4 C. & P. 233.

(*g*) *R. v. Hutchinson*, 2 B. & C. 608, n., per Bayley, J. In Mr. Phillipp’s work on Evidence, 1 vol. p. 282, these declarations are stated to have been held admissible, but this is a mistake. (*h*) *R. v. Mead*, 2 B. & C. 605 ; 4 D. & R. 120, S. C.

(*i*) *Doe v. Ridgway*, 4 B. & A. 53.

(*k*) *R. v. Gray*, Ir. Cir. Rep. 76, per Torrens, J.

poison, and had died in consequence, her dying declarations were admitted on the part of the prosecution, apparently on the ground that it was all one transaction (*l*).

§ 501. The reasons for thus restricting the admission of this species of evidence may be,—first, the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain,—secondly, the danger of letting in incomplete statements, which though true as far as they go, do not constitute “the whole truth,”—and, thirdly, the experienced fact, that implicit reliance cannot in all cases be placed on the declarations of a dying person; for his body may have survived the powers of his mind (*m*); or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say, or seem to say, whatever they choose to suggest (*n*). These, or the like considerations, have been regarded as counterbalancing the force of the general principle above stated, leaving this exception to stand only upon the ground of the public *necessity* of preserving human life by bringing manslaughterers to justice. For it often happens, that there is no third person present to be an eye-witness to the fact; and the usual witness in other cases of felony, namely, the party injured, is himself destroyed (*o*). Still, this restriction applies only to declarations offered on the sole ground that they were made in extremis; for where they constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, they are admissible as in other cases; irrespective of the fact, that the declarant was under apprehension of death.

§ 502. The persons whose declarations are thus admitted, are

(*l*) *R. v. Baker*, 2 M. & Rob. 53, per Coltman, J., after consulting Parke, B. The point would have been reserved for the opinion of the judges, but the prisoner was acquitted.

(*m*) Thus, in *King John*, Prince Henry is made to say:—

“Death’s siege is now

Against the mind, the which he pricks and wounds
With many legions of strange fantasies;
Which, in their throng and press to that last hold,
Confound themselves.”—Act 5, scene 7.

(*n*) *Jackson v. Kniffen*, 2 Johns. 31, 35, per Livingston, J.

(*o*) 1 East, P. C. 353; 2 Johns. 35.

considered as standing in the same situation as if they were sworn, the danger of impending death being equivalent to the sanction of an oath. It follows, therefore, that where the declarant, if living, would have been incompetent to testify by reason of infidelity, imbecility of mind, or tender age, his dying declarations are inadmissible (*p*). On the other hand, as the testimony of an accomplice is admissible against his fellows, the dying declarations of a *felo de se* are admissible against one indicted for assisting the deceased in his self-murder (*q*).

§ 503. It is essential to the admissibility of these declarations, first, that at the time when they were made the declarant should have been in *actual danger of death*; secondly, that he should then have had a *full apprehension of his danger*; and, lastly, that *death should have ensued* (*r*). All these facts, therefore, must be proved to the satisfaction of the judge before the evidence will be received (*s*). It is not, however, necessary that the declarant should have stated that he was speaking *under a sense of impending death*, provided it satisfactorily appears, in any mode, that the declarations were really made under that sanction; as for instance, if the fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction, or the like. In short, all the circumstances of the case may be resorted to, in order to ascertain the state of the declarant's mind (*t*). The length of

(*p*) *R. v. Pike*, 3 C. & P. 598; *R. v. Drummond*, 1 Lea. C. C. 338. In this last case the declaration of an attainted convict was rejected. This would no longer be a ground of objection. 6 & 7 Vict. c. 85, § 1.

(*q*) *R. v. Tinckler*, 1 East, P. C. 354.

(*r*) *Sussex Peerage case*, 11 Cl. & Fin. 108, 112, per Lord Denman, who laid down the law as follows:—"With regard to declarations made by persons in extremis, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time, of the danger and of death, such declarations can be received in evidence; but *all these things must concur*, to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination." (*s*) Ante, § 21.

(*t*) *R. v. Woodcock*, 1 Lea. C. C. 503; *R. v. John*, 1 East, P. C. 357, 358; *R. v. Bonner*, 6 C. & P. 386; *R. v. Van Butchell*, id. 631; *R. v. Mosley*, 1 Moo.

time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the testimony; though, in the absence of better evidence, it may serve as one of the exponents of the deceased's belief, that his dissolution was or was not impending. It is the *impression* of almost immediate dissolution, and not the rapid succession of death in point of fact, which renders the testimony admissible (*f*). Therefore if it appear that the deceased, at the time of the declaration, had *any* expectation or hope of recovery, however slight it may have been, and though death actually ensued within an hour afterwards, the declaration will be inadmissible (*u*). On the other hand, belief that he will not recover is not in itself sufficient, unless there be also the prospect of "almost immediate dissolution" (*x*).

§ 504. It is worthy of remark that in Scotland it is immaterial, except as regards the *weight* of the evidence, whether or not the declaration be made under the impression of impending death; but where a party has received a mortal wound, as account of the matter given by him at any time subsequent to the inquiry will be admissible in the event of his death, provided it were made seriously and deliberately, and whilst the deceased appeared to be aware of what he was doing, and in the possession of his faculties (*y*).

C. C. 97; *R. v. Spilsbury*, 7 C. & P. 187, per Coleridge, J.; *R. v. Minton*, 1 M'Nally, Ev. 386; *R. v. Scallan*, *Craw. & Dix*, Abr. Cas. 340.

(*f*) In *R. v. Woodcock*, 1 Lea. C. C. 500, the declarations were made two days before death; in *R. v. Bonner*, 6 C. & P. 386, three days; in *R. v. Tinkler*, 1 East, P. C. 354, ten days; and in *R. v. Mosley*, 1 Moo. C. C. 97, eleven days; yet they were all received. In this last instance it appeared that the surgeon did not think the case hopeless, and told the patient so: but that the patient thought otherwise. See *R. v. Howell*, 1 C. & Kir. 689; 1 Den. C. C. 1, S.C.

(*u*) *R. v. Welborn*, 1 East, P. C. 358; *R. v. Christie*, 2 Russ. C. & M. 754; *R. v. Hayward*, 6 C. & P. 157, 160; *R. v. Crockett*, 4 id. 544; *R. v. Fagent*, 7 id. 238; *R. v. Magson*, 9 id. 418. Where the words were, "I have no hope of recovering, unless it be the will of God," *R. v. Murphy*, Ir. Cir. Rep. 38, per Richards, B.; "I think myself in great danger," *R. v. Errington*, 2 Lew. C. C. 148, Held insufficient. See *R. v. Howell*, 1 C. & Kir. 689; 1 Den. C. C. 1, S.C.

(*x*) Per Hullock, B., in *R. v. Van Butchell*, 3 C. & P. 629, 631. See *ante* *R. v. Bonner*, 6 C. & P. 386; *R. v. Perkins*, 9 C. & P. 395; 2 Moo. C. C. 135, S.C.; *Com. v. King*, 2 Virg. Cas. 78; *Com. v. Gibson*, id. 111; *Com. v. Vass*, 3 Leigh, B. 786; *The State v. Poll*, 1 Hawks, 442.

(*y*) *Alison's Prac. Cr. Law*, 510—512, 604—607; 2 Hume on Crimes, 391—393.

§ 505. The declarations of the deceased are admissible *only to those things to which he would have been competent to testify*, if sworn in the cause. They must therefore in general speak to facts only, and not to mere matters of opinion (z); and must be confined to what is relevant to the issue. But it is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the cause, though any departure from this mode may effect the credibility of the declarations. Therefore, in general, it is no objection to their *admissibility*, that they were made in answer to leading questions, or obtained by earnest solicitation (a). But where a statement, ready written, was brought by the father of the deceased to a magistrate, who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was rejected in Ireland by Mr. Justice Crampton, who observed that "in the state of languor in which dying persons usually are, their assent could easily be got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true;" and his Lordship added, "the magistrate should not have trusted to the relation of a third person, but should have taken down the deceased's declaration from her own lips, or at least have had it taken down in his presence" (b). When the declarations have been properly made, the right to offer them in evidence is not restricted to the side of the prosecutor; they are equally admissible in favour of the party charged with causing the death(c).

§ 506. Whatever the declaration may be, it must be *complete* in itself; for if the dying man appears to have intended to qualify it by other statements, which he is prevented by any cause from making, it will not be received (d). Again, it has been held, that if the statement were *committed to writing* at the time it was made, this writing must be produced, or its non-production accounted for; and that neither a copy, nor parol evidence of the

(z) R. v. Sellers, Car. Cr. L. 233.

(a) R. v. Fagent, 7 C. & P. 238; R. v. Reason, 1 Stra. 499; 16 How. St. Tr. 1, 24 et seq., S. C.; Com. v. Vass, 3 Leigh, R. 786.

(b) R. v. Fitzgerald, Ir. Cir. Rep. 168, 169.

(c) R. v. Scaife, 1 M. & Rob. 551; 2 Lew. C. C. 150, S. C. The same law prevails in Scotland, 2 Hume on Crimes, 393.

(d) 3 Leigh, R. 797.

declaration can be admitted in the first instance to supply the omission (e). But where three declarations had been made at different times on the same day, one of which was made under oath to a magistrate, and reduced to writing, but the other two were not, it was held that the latter might be proved by parol, though the written statement was not produced (f). If the deposition of the deceased has been taken under any of the statutes on that subject, and is inadmissible, as such, for want of compliance with some of the legal formalities, it seems it may still be treated as a dying declaration, if made in extremis (g).

§ 507. Though these declarations, when deliberately made under a solemn and religious sense of impending dissolution, and concerning circumstances wherein the deceased was not likely to have been mistaken, are entitled to great weight, if precisely identified; yet it is always to be recollected that the accused has not the *power of cross-examination*,—a power quite as essential to the eliciting of all the truth as the obligation of an oath can be;—and that where the witness has not a deep sense of accountability to his Maker, and an enlightened conscience, the passion of anger, and feelings of revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the truth and accuracy of his statements, and give a colour to the transaction, which, had further investigation been attainable, might have been proved to be incorrect. Moreover, the particulars of the violence to which the deceased has spoken, are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative (h).

(e) *R. v. Gay*, 7 C. & P. 230, per Coleridge, J.; *R. v. Reason*, 16 How. St. Tr. 1, 24, et seq.; 1 Str. 499, S. C. But see ante, § 305.

(f) *R. v. Reason*, 16 How. St. Tr. 1, 24, et seq.; 1 Str. 499, S. C., Platt, C. J., dubit. See *R. v. Scallan*, *Craw. & Dix*, Abr. Cas. 340.

(g) *R. v. Woodcock*, 1 Lea. C. C. 502; *R. v. Callaghan*, McNally's Ev. 385.

(h) *Jackson v. Kniffen*, 2 Johns. 35, 36, per Livingston, J.; *R. v. Ashton*, 2 Lew. C. C. 147, per Alderson, B. See also Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255 (293); 2 St. Ev. 367, and 1 Ph. Ev. 292.

CHAPTER XIV.

OF ADMISSIONS.

§ 508. UNDER the head of exceptions to the rule rejecting hearsay evidence, it has been usual to treat of *admissions and confessions*; considering them as declarations against interest, and therefore as probably true. But in regard to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act done, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a *substitute* for the ordinary and legal proof (a); either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct. It is in this light that confessions and admissions are regarded by the Roman law, as is stated by Mascardus. *Illud igitur in primis, ut hinc potissimum exordiar, non est ignorandum, quod etsi confessioni inter probationum species locum in præsentia tribuerimus; cuncti tamen fere Dd. unanimes sunt arbitrati, ipsam potius esse ab onere probandi relevationem, quam proprie probationem* (b). Many admissions,

(a) As to when the admissions of a party with respect to written instruments, may be substituted for the ordinary proof of such instruments by their production, see ante, §§ 302—304.

(b) Mascard. de Prob. vol. i. quæst. 7, n. 1, 10, 11; Menochius de Præsump. lib. 1, quæst. 61, n. 6; Alciatus de Præsump. pars. 2, n. 4. The Roman law distinguishes with great clearness and precision, between confessions *extra judicium*, and confessions in *judicio*; treating the former as of very little and often of no weight, unless corroborated, and the latter as generally, if not always, conclusive, even to the overthrow of the *præsumptio juris et de jure*; thus constituting an exception to the conclusiveness of this class of presumptions. But to give a confession this effect, certain things are essential, which Mascardus cites, out of Tancred:—

“Major, spontè, sciens, contra se, ubi jus fit;
Nec natura, favor, lis, jusve repugnet, et hostis.”

Mascard. ub. supr. n. 15, Vid. Dig. lib. 42, tit. 2, de confessis. Cod. lib. 7, tit. 59; Van Leeuwen's Comm., book v. ch. 21.

however, being made by third persons, are receivable on mixed grounds; partly as belonging to the *res gestæ*, partly as made against the interest of the person making them, and partly because of some privity with him against whom they are offered in evidence.

§ 509. In our law, the term *admission* is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent (c); the term *confession* being generally restricted to *acknowledgments of guilt*. This distinction will be better understood by an example. Thus, on the trial of Lord Melville, who was charged, amongst other things, with criminal misapplication of moneys received from the Exchequer, the admission of his agent and authorised receiver was held sufficient proof of the fact of such agent having received the public money; though had such admission been tendered in evidence to establish the charge of any misapplication of the money by the noble defendant, it would clearly have been rejected. The law was thus stated by Lord Chancellor Erskine. "This first step in the proof," (namely, the receipt of the money by the agent,) "must advance by evidence applicable alike to civil, as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime" (d).

§ 510. As the rules of evidence, respectively applicable to admissions and confessions, differ in some respects, it will be convenient to discuss the two subjects in separate chapters. We will therefore begin with ADMISSIONS; and the *first rule* relating to them, which is important to be borne in mind and distinctly understood, is, that *the whole statement containing the admission must be taken together*; for though some part of it may contain matter favourable to the party, and the object is only to ascertain

(c) Lord Melville's trial, 29 How. St. Tr. 746—764.

(d) 29 How. St. Tr. 764.

what he has conceded against himself, and what may therefore be presumed to be true; yet, unless the whole is received and considered, the true meaning and import of the part, which is good evidence against him, cannot be ascertained (*e*). But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit; but the jury must consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those making against him (*f*).

§ 511. This rule, simple as it appears, is not without difficulty in its practical application; and we therefore propose briefly to refer to a few of the leading decisions on the subject. In the first place, it *applies equally to written, as to verbal, admissions*; and, consequently, where a defendant has rendered a debtor and creditor account to the plaintiff, which the latter produces in proof of his demand, it will be equally admissible in evidence of the defendant's set-off (*g*); though the plaintiff will be at liberty, while relying on the creditor side of the account, to impeach items which appear on the debtor side (*h*). If the admission be contained in an affidavit, a written examination (*i*), an answer in Chancery, or other document complete in itself, the rule at common law is that the whole document must be read, though the jury need not give equal credit to every part of it, and will frequently lend an academic faith to such portions as make in favour of the declarant (*k*); and so stringent is this rule, that where, on

(*e*) *Thomson v. Austen*, 2 D. & Ry. 361, per Abbott, C. J.; *Fletcher v. Froggatt*, 2 C. & P. 569, per *id.*

(*f*) *Bermon v. Woodbridge*, 2 Doug. 788, per Lord Mansfield; *Smith v. Blandy*, Ry. & M. 259, per Best, C. J.; *Cray v. Halls*, cited *id.* 258, per Abbott, C. J. See also *Whitwell v. Wyer*, 11 Mass. 6, 10; *Garey v. Nicholson*, 24 Wend. 350; *Kelsey v. Bush*, 2 Hill, R. 440.

(*g*) *Randle v. Blackburn*, 5 Taunt. 245.

(*h*) *Rose v. Savory*, 2 Bing. N. C. 145; 2 Sc. 199, S. C.

(*i*) In *Prince v. Samo*, 7 A. & E. 630, Coleridge, J., asked whether the question had ever been decided as to depositions? To which the counsel replied, that no express decision had been found.

(*k*) *Bermon v. Woodbridge*, 2 Doug. 788, per Lord Mansfield; *Blount v. Burrow*, 4 Brown, C. C. 75, per Lord Hardwicke.

exceptions taken, a second answer had been sent it, the defendant was allowed to insist upon having that also read, in order to explain what he had sworn in his first answer (*l*). It has also been held that a party, against whom an answer in Chancery is produced, may have the whole bill read as part of his adversary's case, on the ground that this is like the ordinary case of a conversation, where the answers of a party cannot be given in evidence against him, without also proving the questions which drew forth the answers (*m*). The jury, however, will in such case be warned, that the statements in the bill are not admissions of the facts contained therein, it being notorious that allegations, not consistent with fact, are frequently introduced into a bill, for the sole purpose of eliciting truth from the opposite party (*n*). Again, in *Goss v. Quinton* (*o*), where the plaintiffs, who were assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners, as proof that he took certain property, the Court held that they thereby made his cross-examination evidence in the cause; and as, in this cross-examination, the defendant had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as *some evidence* on behalf of the defendant himself of the agreement and its contents; and that too, though the absence of the document was not accounted for, nor had notice been given to the plaintiffs to produce it. So, in an action against a sheriff, where an undersheriff's letter was produced by the plaintiff to affect the defendant, it was held to be some evidence also of certain facts stated therein, which tended to excuse the sheriff (*p*); and on a similar principle, where, in order to fix a sheriff in an action of trespass against him, the plaintiff put in his warrant under which the seizure was made, and which recited the writ of *fi. fa.*, the Court held, that this recital was some evidence of the writ, and consequently, tended to protect the sheriff, as showing that the seizure was made by the authority of the law (*q*).

(*l*) *R. v. Carr*, 1 Sid. 418; *B. N. P.* 237; *Lord Bath v. Bathersea*, 5 Mod. 10; *Lynch v. Clerke*, 3 Salk. 154.

(*m*) *Pennell v. Meyer*, 2 M. & Rob. 98, per Tindal, C. J.; 8 C. & P. 470, S. C.

(*n*) *Id.*

(*o*) 3 M. & Gr. 825.

(*p*) *Haynes v. Hayton*, 6 L. J. K. B. (O. S.) 231, recognised in *Bessey v. Windham*, 6 Q. B. 172.

(*q*) *Bessey v. Windham*, 6 Q. B. 166.

§ 512. The same rule prevails to a considerable extent in *equity*; and therefore, where a defendant had been examined on two days before commissioners of bankruptcy, and the plaintiff read the examination taken on the first day, he was compelled to read that also, which was taken on the second day (*r*); and where a plaintiff in equity read that part of the defendant's account-book, which charged the latter, the defendant was allowed to read the discharging part as evidence for himself (*s*). With respect, however, to *answers* and *examinations in Chancery*, the equity rule is far less comprehensive than that which is recognised at common law; and although, if a party in equity admits in his examination or answer, that he received a sum, and then adds in the same sentence, that he immediately paid it away,—or if he states in a still more general form, that a person gave him 100*l.*,—the charge and the discharge will be so blended together, that the one will not be admissible without the other (*t*); still, if he once admits the receipt of money as an independent fact, he cannot refer to other parts of his examination or answer, much less to affidavits sworn by him, or to schedules attached to his answer, for the purpose of showing that he has liquidated the amount so admitted to have been received, by separate and independent payments (*u*). So, if a plaintiff reads a passage in the answer as evidence of a particular fact, the defendant cannot read other parts, even though grammatically connected with such passage by conjunctive particles, unless they be really explanatory of its meaning (*v*); and if, in order to understand the sense of the passage on which the plaintiff relies, it is necessary to read on the part of the defendant other portions of the answer, still these portions will be evidence only so far as they are explanatory; and any new facts introduced therein, though so immediately connected with the parts admitted as to be incapable of subtraction,

(*r*) *Smith v. Biggs*, 5 Sim. 391, per Shadwell, V. C.

(*s*) *Carter v. Lord Colrairie*, cited in 2 Ball & Beat. 384; *Blount v. Burrow*, 4 Brown, C. C. 75, per Lord Hardwicke.

(*t*) *Ridgeway v. Darwin*, 7 Ves. 404, per Lord Eldon; *Thompson v. Lambe*, id. 588, per id.; *Robinson v. Scotney*, 19 id. 584, per Sir William Grant, M. R.; B. N. P. 237. See also *Awdley v. Awdley*, 2 Vern. 194; *Hampton v. Spencer*, id. 288. *Freeman v. Talbot* 5 B. & C. 329

(*u*) Cases cited in last note.

(*v*) *Davis v. Spurling*, 1 Russ. & Myl. 68, per Leach, M. R.

will be considered as not read (*w*). This rule seems to have been adopted in consequence of the subtle contrivances of equity draftsmen, whose skill formerly consisted in so grammatically blending important points of the defendant's case with admissions that could not be withheld, as to render it necessary that both should be read in conjunction, and thus to prove their client's case by means of his own unsupported statements (*x*). The oats and tares were reaped together.

§ 513. Though the whole of a document may, at common law, be read by the one party, where the other has already put in evidence a partial extract, this rule will not warrant the reading of *distinct entries* in an account-book, unconnected with the particular entry relied on by the opponent (*y*); nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation books, or a series of copies of letters inserted in a letter-book, merely because the adversary has read therefrom one or more papers, or entries, or letters (*z*). If, indeed, the extracts put in expressly refer to other documents, these may be read also; but the mere fact, that the remaining portions of the papers or books may throw light on the parts selected by the opposite party, will not be sufficient to warrant their admission; for such party is not bound to know whether they will or not; and, moreover, the light may be a false one (*a*).

§ 514. The same rule prevails in the case of a *conversation*, wherein several distinct matters have been discussed; and although it was at one time held on high authority, that if a witness were questioned as to a statement made by an adverse party, such party might lay before the Court the whole which was said by him in the same conversation, even matter not properly connected with the statement deposed to, provided only that it related to the subject-matter of the suit (*b*); yet a sense of the

(*w*) *Bartlett v. Gillard*, 3 Russ. 156, per Lord Eldon.

(*x*) *Gresley Ev.* 13.

(*y*) *Catt v. Howard*, 3 Stark. R. 6, per Abbott, C. J.

(*z*) *Sturge v. Buchanan*, 10 A. & E. 598; 2 M. & Rob. 90, S. C.

(*a*) *Id.* 600, 605, per Lord Denman.

(*b*) *The Queen's case*, 2 B. & B. 297, 298, per Abbott, C. J.

extreme injustice that might result from allowing such a course of proceeding, has induced the Courts, in later times, to adopt a stricter rule; and if a part of a conversation is now relied on as an admission, the adverse party can give in evidence only so much of the same conversation, as may explain or qualify the matter already before the Court (*c*). The case in which the Court of Queen's Bench came to this decision admirably illustrates its propriety and justice. It was an action against the defendant for having maliciously arrested the plaintiff for debt, the plaintiff contending that the advance had been a gift and not a loan. A witness for the plaintiff acknowledged on cross-examination, that he had heard the plaintiff admit on oath, that he had repeatedly been insolvent, and had been remanded by the Court; whereupon he was asked in re-examination whether the plaintiff had not, on the same occasion, expressly stated that the money was given, and not lent. The Court, in holding that the answer to this question was not evidence, observed, that, if it were, "the jury would be bound to consider, and might give full effect to it, and thus award large damages for an injury, of which no particle of proof could be found but the plaintiff's own assertion;" and they added, that "the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested" (*d*).

§ 515. With regard to *letters*, it has been held that a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production; because in such case, the letters to which those put in were answers are in the adversary's hands, and he may produce them, if he thinks them necessary to explain the transaction (*e*). But if a plaintiff puts in a letter by the defendant, on the back of which is something written by himself, the defendant is entitled to have the whole read (*f*); and where a defendant laid before the Court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the last letter of the plaintiff, it being considered as a part of an entire correspondence (*g*).

(*c*) *Prince v. Samo*, 7 A. & E. 627, 634, 635. (*d*) *Id.*

(*e*) *Lord Barrymore v. Taylor*, 1 Esp. 326, per Lord Kenyon.

(*f*) *Dagleish v. Dodd*, 5 C. & P. 238, per Taunton, J.

(*g*) *Roe v. Day*, 7 C. & P. 705, per Park, J.

§ 516. Questions not unfrequently arise as to the admissibility of letters, account-books, &c., which are tendered as admissions, in cases where their existence or contents have been discovered by means of a compulsory examination or answer of the party, either in previous bankruptcy proceedings, or in a Chancery suit; and it is often contended in such cases that the documents cannot be read, without first producing the examination or answer. On one or two occasions at *Nisi Prius*, this objection has been allowed to prevail (*h*); but it has since been decided in *banc*, that, whatever the correct doctrine may be with respect to documents referred to in an examination or answer, and actually *annexed* thereto, there is no rule of law which, in other cases, will compel a party to treat the document on which he relies as part of a previous examination or answer (*i*). "It was surmised," said Lord Denman, while pronouncing the judgment of the Court in *Sturge v. Buchanan*, "that an unfair advantage had been taken of the defendant in obtaining a knowledge of these letters through a suit in Chancery, and then producing them without the answer, which may have greatly qualified and altered their effect. But I cannot think that a judge at *Nisi Prius* has any thing to do with these considerations: he is to inquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved" (*k*). It has even been doubted by Lord Tenterden, whether, in the event of a document being annexed to an answer in Chancery, the answer need be read, if it have no connection with the cause in which the document is produced (*l*). If however the letter in question be not written by the party against whom it is offered, though contained in the schedule of his answer in Chancery, and be merely used against him, as raising an inference from possession that he knew of its contents, and had acted upon it, common fairness seems to dictate, in conformity with a decision of Chief Justice Tindal (*m*), that the letter should not be read without the answer; for the answer of the party might contain such an explanation of the circumstances under

(*h*) *Yates v. Carnsew*, 3 C. & P. 99, per Lord Tenterden; *Holland v. Reeves*, 7 C. & P. 36, per Alderson, B.

(*i*) *Long v. Champion*, 2 B. & Ad. 284; *Sturge v. Buchanan*, 10 A. & E. 605.

(*k*) 10 A. & E. 605.

(*l*) *Long v. Champion*, 2 B. & Ad. 286

(*m*) *Hewitt v. Piggott*, 5 C. & P. 75, 77.

which the letter came into his possession, as also such a contradiction of any passages in it which seemed to bear against his rights, as utterly to neutralise its effect. If a party, while making a verbal admission, refers to a written paper, without which the admission is incomplete, the paper should be produced, before the statement can be used as evidence against him (*n*).

§ 517. Where the admission, whether oral or in writing, contains matters stated *as mere hearsay*, it may be questionable whether such matters can be received in evidence. If tendered against the party making the statement, they are clearly entitled to very little weight, and unless coupled with a further admission, that he believes them to be true, they would seem, like hearsay declarations against interest (*o*), to be inadmissible. But does the same rule hold, when they are offered in favour of the party making the admission, as tending to explain the statement which tells against him? Mr. Justice Chambre thinks that it does. "It appears to me," says he, "that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible, only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts, which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for a discovery" (*p*). Notwithstanding this authority, it may perhaps be contended with success, that, since the answer is offered as the admission of the party against whom it is read, the whole should be laid before the jury, for the purpose of showing under what impressions the admission was made, though some parts of it be only stated upon hearsay and belief.

§ 518. The rule requiring the whole admission to be taken together is so important, that the judge will do well to explain distinctly to the jury its bearing and extent, whenever any portion of the statement is favourable to the party against whom it is read;

(*n*) *Jacob v. Lindsay*, 1 East, 460; *Falconer v. Hanson*, 1 Camp. 171; 1 Ph. Ev. 341.

(*o*) *Lord Trimblestown v. Kemmis*, 9 Cl. & Fin. 780, 784—786; ante, § 479.

(*p*) *Roe v. Ferrars*, 2 B. & P. 548.

after the party had arrived at full age; and therefore, if an action be brought against an adult for goods supplied to him during his minority, admissions made, and letters written by him while under age, may be proved on behalf of the plaintiff (*y*).

§ 521. Again, the common law recognises no distinction between *nominal* and *real* parties; and, therefore, if the consignee of goods uses the name of the consignor in proceeding against a shipper (*z*), or if the assignee of a bond is driven to sue the obligor in the name of the original obligee (*a*), or if the cestui que trust brings an action in the name of his trustee, courts of *Nisi Prius* cannot reject the admissions of the nominal plaintiffs as evidence for the defendants (*b*). Still, the persons beneficially interested are not without remedy, since they may always obtain protection from the Court of Chancery; and if the admission of the nominal plaintiff consists of a *solemn instrument*, such as a release, which being pleaded in bar operates by way of estoppel, they may also appeal to the equitable jurisdiction of the court of law, in which the action is brought, and move to set aside the plea (*c*). This latter course, as being less tedious and far less expensive than an application to Chancery, is now usually adopted where a clear case of fraud between the releasor and the defendant can be established; but here it must be mentioned by way of caution, that unless the case be such as would manifestly induce a court of equity to set aside the release as against the defendant, the judges at common law will not interfere (*d*).

(*y*) *O'Neill v. Read*, 7 Ir. Law R. 434.

(*z*) *Banerman v. Radenius*, 7 T. R. 663; 2 Esp. 653, S. C.

(*a*) *Craib v. D'Aeth*, 7 T. R. 670, n.

(*b*) *Alner v. George*, 1 Camp. 392, per Lord Ellenborough; *Gibson v. Winter*, 5 B. & Ad. 96, 102—104.

(*c*) *Payne v. Rogers*, 1 Doug. 407; *Legh v. Legh*, 1 B. & P. 447; *Innell v. Newman*, 4 B. & A. 419; *Hickey v. Burt*, 7 Taunt. 48; *Mountstephen v. Brooke*, 1 Chit. R. 390; *Manning v. Cox*, 7 Moore, 617; *Barker v. Richardson*, 1 Y. & J. 362; *Johnson v. Holdsworth*, 4 Dowl. 63. In some of these cases, the courts appear to have set aside the release itself; but in *Phillips v. Clagett*, 11 M. & W. 93, Parke, B., observed, "I apprehend that to have been per incuriam, for I cannot understand what authority the Court has to do that;—all they can do is, not to allow the release to be pleaded."

(*d*) *Rawstorne v. Gandell*, 15 M. & W. 304; *Phillips v. Clagett*, 11 M. & W. 84, 91—96; *Crook v. Stephen*, 5 Bing. N. C. 688, 691; *Wild v. Williams*, 6 M. & W. 490; *Jones v. Herbert*, 7 Taunt. 421; *Arton v. Booth*, 4 Moore, 192; *Herbert v. Pigott*, 2 Cr. & M. 384; 4 Tyrwh. 284, S. C.

§ 522. Whether, if the admission of the nominal plaintiff be merely *verbal*, or be contained in some *writing not under seal*, as a receipt, for instance, courts of law will, on motion, prevent the defendant from availing himself of it to defeat the claims of the real plaintiff, is a question still undecided, though on principle it is difficult to see what valid distinction can be drawn between these admissions, and those which are expressed in solemn form (*e*). Be this as it may, it seems perfectly clear that, notwithstanding a receipt in full has been given by the nominal plaintiff to the defendant, the parties really interested may show to the jury that the money has in fact never been paid; for, as such a receipt is at best but an inconclusive declaration of payment, it must be open to explanation and controlling proof, and would be equally so, though the party who gave it was not only the nominal but the real plaintiff (*f*).

§ 523. It is worthy of remark, that in the American courts the practice is somewhat different, as the judges presiding at Nisi Prius exercise the same equitable jurisdiction as if they were sitting in banc; and consequently, if a release from a nominal plaintiff be pleaded in bar, a prior assignment of the cause of action, with notice thereof to the defendant, and an averment that the suit is prosecuted by the assignee for his own benefit, is a good replication (*g*). Nor is the nominal plaintiff permitted, by the entry of a *retraxit*, or in any other manner, injuriously to affect the rights of his assignee, in a suit at law (*h*).

(*e*) *Alner v. George*, 1 Camp. 393, per Lord Ellenborough; recognised in *Gibson v. Winter*, 5 B. & Ad. 104, per Lord Denman.

(*f*) See *Wallace v. Kelsall*, 7 M. & W. 273, 274, per Parke, B., explaining the decisions in *Skaife v. Jackson*, 3 B. & C. 421, and *Farrar v. Hutchinson*, 9 A. & E. 641; 1 P. & D. 437, S. C. See also *Henderson v. Wild*, 2 Camp. 561, per Lord Ellenborough.

(*g*) *Mandeville v. Welch*, 5 Wheat. 277, 283; *Andrews v. Beecker*, 1 Johns. Cas. 411; *Raymond v. Squire*, 11 Johns. 47; *Littlefield v. Story*, 3 Johns. 425; *Dawson v. Coles*, 16 Johns. 51; *Kimball v. Huntington*, 10 Wend. 675; *Owings v. Low*, 5 Gill & Johns. 134. In *Craib v. D'Aeth*, 7 T. R. 670, n., a similar replication was adopted; "but no objection appears to have been taken on this ground, and the general practice is undoubtedly to apply specially to the court." See per Lord Denman, in *Gibson v. Winter*, 5 B. & Ad. 103.

(*h*) *Welch v. Mandeville*, 1 Wheat. 233. "By the common law, *chooses in action* were not assignable, except to the Crown. The civil law considers them as, strictly speaking, not assignable; but, by the invention of a fiction, the

§ 524. In holding that the admissions of mere nominal parties are receivable in evidence, the law does not include the declarations of a *prochein amy* or *guardian*, because these persons, though their names appear on the record, are not in fact parties to the suit, but are considered as officers of the court specially appointed by the judges to look after the interests of the infant (*i*). A solemn admission, however, made by a guardian or *prochein amy* in good faith in a pending suit, for the purpose of that trial only, is governed by other considerations, and will be equally admissible with like admissions made by the attorney in the cause (*j*).

§ 525. When several persons are *jointly* interested in the subject-matter of the suit, the general rule is, that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favour of or against one or more of them separately; provided the admission relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested

Roman juriconsults contrived to attain this object. The creditor, who wished to transfer his right of action to another person, constituted him his attorney, or *procurator in rem suam*, as it was called; and it was stipulated that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. Pothier de Vente, No. 550. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person than the assignee, or a release from any other person than him. *Ib.* 110, 554; Code Napoleon, liv. 3, tit. 6; De la Vente, c. 8, § 1690. The Court of Chancery, imitating, in its usual spirit, the civil law in this particular, disregarded the rigid strictness of the common law, and protected the rights of the assignee of choses in action. This liberality was at last adopted by the courts of common law, who now consider an assignment of a chose in action as substantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor, the beneficial interest and control of the suit being, however, considered as completely vested in the assignee as *procurator in rem suam*. See *Master v. Miller*, 4 T. R. 340; *Andrews v. Beecker*, 1 Johns. Cas. 411; *Bates v. New York Insurance Company*, 3 Johns. Cas. 242; *Wardell v. Eden*, 1 Johns. 532, in notis; *Carver v. Tracy*, 3 Johns. 426; *Raymond v. Squire*, 11 Johns. 47; *Van Vechten v. Greves*, 4 Johns. 406; *Weston v. Barker*, 12 Johns. 276." See the Reporter's note to 1 Wheat. 237.

(i) *Eccleston v. Speke*, alias *Petty*, 3 Mod. 258; *Cowling v. Ely*, 2 Stark. R. 366, per Abbott, J.; *Webb v. Smith, Ry. & M.* 106, per Littledale, J.; *Morgan v. Thorne*, 7 M. & W. 408, per Parke, B.; *Sinclair v. Sinclair*, 13 M. & W. 640, 646. These cases overrule *James v. Hatfield*, 1 Str. 548.

(j) See post, § 547.

with the party against whom the evidence is tendered (*j*). Thus, the representation or misrepresentation of any fact, made by one partner with respect to some partnership transaction, will bind the firm (*k*); and if partners bring an action as on a joint contract, an admission by one of them that the subject-matter of the contract was his separate property, will render the plaintiffs liable to a nonsuit (*l*). So, where it appeared on the record, that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, statements made by one of such proprietors were admitted on the part of the defendant (*m*). And where the obligee of a bond filed a bill against two joint and several obligors, alleging that the bond had been delivered up to one of them by mistake, and praying that he might recover the amount due on it, an admission by the party to whom the bond was given up, that it had been delivered to her by mistake, was held to be evidence against the co-obligor, though the joint answer of the defendants had traversed the allegation as to mistake, and, simply admitting the delivery of the bond, had stated that the party to whom it was given up had destroyed it (*n*).

§ 526. This doctrine is forcibly illustrated by those cases, where joint debts, barred by the Statute of Limitations, have been revived in consequence of a part payment having been made by one of the debtors; the law regarding such payment in the light of an acknowledgment by all the debtors of their joint liability. Thus, if two or more persons make a joint and several promissory note, and one of them, within six years from the commencement of the suit, pays interest upon it, or makes a partial payment of the principal, this act is deemed such an acknowledgment of a subsisting debt as to take the case out of the Statute of Limitations against all the makers (*o*); and this too, though the payment were

(*j*) *Whitcomb v. Whiting*, 2 Doug. 652; *Wood v. Braddick*, 1 Taunt. 104.

(*k*) *Rapp v. Latham*, 2 B. & A. 795; *Thwaites v. Richardson*, Pea. R. 16; *Nicholls v. Dowding*, 1 Stark. R. 81, per Lord Ellenborough.

(*l*) *Lucas v. De la Cour*, 1 M. & Sel. 249.

(*m*) *Kemble v. Farren*, 3 C. & P. 623, per Tindal, C. J.

(*n*) *Crosse v. Bedingfield*, 12 Sim. 35.

(*o*) *Burleigh v. Stott*, 8 B. & C. 36; 2 M. & Ry. 32, 8 C.; *Pease v. Hirst*, 10 B. & C. 122; *Wyatt v. Hodson*, 8 Bing. 309; 1 M. & Sc. 442, 8 C.; *Chippendale*

made more than six years after the note became due, and when consequently the statute had run (*p*);—though the action were brought against one of the makers only as on his separate note, and he were wholly ignorant of the fact of any payment having been made by any of the joint makers (*q*);—and though the person by whom the part payment was made had died before the action, and, consequently, at the time when it was brought, the joint contract had been determined (*r*). So, a part payment of the debt of a firm by one partner will not only extinguish pro tanto the partnership debt, but will also operate as an admission of the existence of the residue of the debt binding on the firm (*s*). In England, this doctrine has even been held to apply to cases, where part payment has been made *after the dissolution of the partnership*, and more than six years from the date of the accruing of the debt (*t*); because, although a dissolution of partnership prevents one partner from binding his fellows by his acts or admissions with respect to all future transactions, yet it cannot vary or neutralise any rights or liabilities created pending the partnership; or, in other words, it is not allowed to operate with a retrospective effect (*u*).

§ 527. The rule thus laid down by the English judges, which enables partnership debts, though barred by the Statute of Limitations, to be revived as against the firm by a part-payment made after a dissolution by one of the late partners, has not been generally approved of in America (*x*); and Mr. Justice Story on one

dale v. Thurston, 4 C. & P. 98, per Parke, J.; M. & M. 411, S. C.; Dowling v. Ford, 11 M. & W. 329.

(*p*) Channell v. Ditchburn, 5 M. & W. 494; Manderston v. Robertson, 4 M. & Ry. 440, cited by Parke, B., 5 M. & W. 497, 498.

(*q*) See Rew v. Pettet, 1 A. & E. 196; 3 N. & M. 456, S. C.; and Beaumont v. Greathead, 2 Com. B. 494.

(*r*) Burleigh v. Stott, 8 B. & C. 36, cited by Parke, J., in Slater v. Lawson, 1 B. & Ad. 397.

(*s*) Story on Partnership, § 107.

(*t*) Goddard v. Ingram, 3 Q. B. 839 ante, § 408, post, § 530.

(*u*) Wood v. Braddick, 1 Taunt. 104; Prichard v. Draper, 1 Russ. & Myl. 191, 199, 200, per Lord Brougham.

(*x*) Those who wish to examine the American authorities on this interesting subject, are referred to the following cases:—M'Intire v. Oliver, 2 Hawks, 209; Beitz v. Fuller, 1 McCord, 541; Cady v. Shepherd, 11 Pick. 400; Van Reimsdyk v. Kane, 1 Gall. 635, 636; Parker v. Merrill, 6 Greenl. 41; Martin v. Root,

occasion (*y*), while pronouncing the judgment of the Supreme Court, has not hesitated to repudiate the doctrine, as inconsistent alike with principle and analogy. After observing that, "by the general law of partnership, the act of each partner, during the continuance of the partnership, and within the scope of its objects, binds all the others; it being considered the act of each and of all, resulting from a general and mutual delegation of authority;" this very learned judge proceeds thus: "A dissolution puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts; and the right of partners, as such, can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified, and restrained, by the express delegation of the whole authority to one of the partners. The question is not, however, as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt; we mean admitted by the whole partnership, or unbarred by the statute; but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, and that is, whether the acknowledgment or promise is to be deemed a mere continuation of the original promise, or a new contract springing out of, and supported by, the original consideration. We think it is the latter, both upon principle and authority; and if so, as after the dissolution no one partner can create a new contract binding upon the others, his acknowledgment is inoperative and void as to them. There is some confusion in the language of the books,

17 Mass. 223, 227; *Vinal v. Burrill*, 16 Pick. 401; *Lefavour v. Yandes*, 2 Blackf. 240; *Bridge v. Gray*, 14 Pick. 55; *Walden v. Sherburne*, 15 Johns. 409; *Hopkins v. Banks*, 7 Cowen, 650; *Clark v. Gleason*, 9 Cowen, 57; *Baker v. Stackpoole*, id. 420; *Levy v. Cadet*, 17 Serg. & Raw. 127; *Searight v. Craighead*, 1 Penns. 135; *Patterson v. Choate*, 7 Wend. 441; *Austin v. Bostwick*, 9 Conn. 496; *Greenleaf v. Quincy*, 3 Fairf. 11; *Ward v. Howell*, 5 Har. & Johns. 60; *Fisher v. Tucker*, 1 McCord, Ch. R. 175.

(*y*) *Bell v. Morrison*, 1 Peters, 367, et seq. The judgment in this case, which well deserves a careful perusal, is given at length in a note to Story on Partnership, § 323. See also the observations of Lord Ellenborough in *Brandram v. Wharton*, 1 B. & A. 467, 468, as to the mischiefs that may result from the English doctrine.

resulting from a want of strict attention to the distinction here indicated. It is often said that an acknowledgment revives the promise, when it is meant that it revives the debt or cause of action. The revival of a debt supposes that it has been once extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it is what essentially constitutes its new being, and is inseparable from it. It stands not by its original force, but by a new promise, which imparts validity to it. Proof of the latter is indispensable to raise the *assumpsit*, on which an action can be maintained."

§ 528. Notwithstanding the cogency of Mr. Justice Story's reasoning, it is probable that the judges in this country will deem it more conducive to justice to abide by their former decisions, however erroneous they may be in principle, than, by overruling them, to shake the reliance of suitors on the landmarks which the law has established; and, indeed, it matters little at what determination our Courts ultimately arrive on this subject, since Lord Tenterden's Act (*z*), by restricting the effect of the rule on debts barred by the Statutes of Limitations to cases of part payment, has virtually remedied most of the evils that would otherwise arise from its more extended operation. The first section of this act, after enacting that "in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments" contained in the old Statutes of Limitations (*a*), "or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby,"—goes on to provide, "that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect

(*z*) 9 Geo. 4, c. 14. See *ante*, § 409. Similar restrictions prevail in Massachusetts; see Rev. Stat. c. 120, § 14.

(*a*) 21 Jac. 1, c. 16; 10 Car. 1, sess. 2, c. 6, Ir.

or by reason only of any written acknowledgment or promise made and signed by any other or others of them : Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever : provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts (b) or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff" (c). The Real Property Limitation Act contains, also, a similar provision respecting acknowledgments of the mortgagor's title given by one of several mortgagees in possession (d).

(b) 21 Jac. 1, c. 16; 10 Car. 1, sess. 2, c. 6, Ir.

(c) § 4 of 9 Geo. 4, c. 14, enacts, that the said acts of James and Charles, and that act, shall "apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant."

(d) 3 & 4 Will. 4, c. 27, § 28. This section enacts, "that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and, in such case, no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid,

§ 529. Before the proof of a payment by one partner or joint promissor will be permitted to rebut the Statute of Limitations on which the other partner or co-promissor relies, it must be shown very distinctly that such payment was made *on account of the joint debt*. Thus, where the payee of a note for 800*l.* brought an action against the surviving executors of the maker, and in order to take the case out of the statute, put in an account stated between himself and the deceased executor, and signed by the latter, on one side of which the plaintiff was charged with the price of malt supplied, and on the other had credit for sundry payments, among which was an item for "one year's interest, 15*l.*;" the Court held that there was no evidence to show that this set-off of 15*l.* was a payment made by the deceased executor in his representative character, and with the intention of binding the assets of the testator (*e*). So, a payment made by one joint maker of a note, and appropriated to the note by the election of the creditor alone, is not a sufficient admission of the debt for the purpose of preventing the other maker from relying on the statute (*f*); and it even seems doubtful, whether a payment, received under a dividend of the effects of a bankrupt co-promissor, will suffice for that purpose (*g*). We may add, that a part payment, made after action brought, cannot

and the person or persons claiming any part of the mortgage money or land or rent by, from, or under, him or them, or any person or persons entitled to any estate or estates, interest or interests, to take effect after, or in defeasance of, his or their estate or estates, interest or interests; and *shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage, as against the person or persons entitled to any other undivided or divided part of the money or land or rent*; and where such of the mortgagees or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."

(*e*) Scholey v. Walton, 12 M. & W. 510.

(*f*) Holme v. Green, 1 Stark. R. 488, per Lord Ellenborough.

(*g*) Brandram v. Wharton, 1 B. & A. 463, questioning Jackson v. Fairbank, 2 H. Bl. 340. This last case was, however, cited by Holroyd, J., as a valid decision, in Burleigh v. Stott, 8 B. & C. 41. See Dowling v. Ford, 11 M. & W. 329.

prevent the operation of the statute, whether it be made by the defendant himself, or by one jointly interested with him (A).

§ 530. It may here be further observed, that if an admission has been made by one of several parties in *fraud* of the others jointly interested with him, and in collusion with the opponent, the same remedies would seem to be open to the innocent parties, as in the case before discussed of an admission made by a trustee, who is a party to the record, in fraud of his *cestui que trust* (i). The case of *Goddard v. Ingram* (k) appears, at first sight, somewhat at variance with the above statement, but perhaps, on close examination, it will be found reconcilable with it. There, an action was brought against two surviving partners for a firm debt, and the Statute of Limitations was pleaded. In order to bar the operation of the statute, the plaintiffs proved that the deceased partner, more than six years after the debt was contracted and the partnership had been dissolved, but within six years from the commencement of the suit, made a payment in respect of it to the plaintiff. The jury found that this payment was made in concert with the plaintiff, in fraud of the two defendants, and in expectation of immediate bankruptcy; and acting under the advice of the presiding judge, they pronounced a verdict for the defendants. The Court of Queen's Bench granted a new trial on the ground of misdirection; but they did not decide, nor was the question mooted, that the defendants could not have protected themselves by applying to the Court of Chancery at an earlier period of the cause.

§ 531. In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were *jointly* interested, or one was *derivatively* interested through the other; and a *mere community of interest* will not be sufficient. Thus, where two persons were in partnership, and an action was brought against them as part-owners of a vessel, an admission made by the one as to a matter which was

(A) *Bateman v. Pinder*, 3 Q. B. 574.

(i) *Rawstorne v. Gandell*, 15 M. & W. 304; *Phillips v. Clagett*, 11 M. & W. 84; ante, § 521.

(k) 3 Q. B. 839. See ante, § 408.

not a subject of copartnership, but only of copart-ownership, was held inadmissible against the other (*i*). So, where two executors were sued on a covenant by the testator for quiet enjoyment, and the question somewhat singularly raised by the facts and the pleadings was, whether the defendants, who had themselves evicted the covenantee, had done so under a lawful title, it was held that the plaintiff, in order to establish this fact, could not put in evidence a declaration by one of the defendants, made after entry, to the effect that both of them had a lawful title through the testator, under a deed prior to that on which the action was founded (*k*). The Court considered that this admission was not made by the party in his character of executor, nor did it relate to any matter touching the testator's estate; but it simply referred to something of which the two defendants had taken advantage in their individual capacities. It may even be doubted whether an express promise made by one executor in his representative character will bind the remaining executors in their representative characters (*l*); and it has been held that the admission of the receipt of money by one of several trustees, who were joint defendants, but were not personally liable, could not be received to charge the others (*m*). So, where a joint contract is severed by the death of one of the contractors, nothing that is subsequently done or said by the survivor can bind the personal representative of the deceased (*n*), nor can the acts or admissions of the executor bind the survivor (*o*). Neither will the admissions of one tenant in common be receivable against his co-tenant, though both are parties on the same side of the suit (*p*); and, in America, it has been decided, that there is

(*i*) *Jaggers v. Binnings*, 1 Stark. R. 64, per Lord Ellenborough.

(*k*) *Fox v. Waters*, 12 A. & E. 43.

(*l*) *Tullock v. Dunn*, Ry. & M. 416, per Abbott, C. J.; cited with approbation by Parke, B., in *Scholey v. Walton*, 12 M. & W. 514, who there questioned the correctness of the contrary opinion, which the Court of Queen's Bench appeared to have entertained in *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & R. 200, S. C.; and in *M'Culloch v. Dawes*, 9 D. & R. 40.

(*m*) *Davies v. Ridge*, 3 Esp. 101, 102, per Lord Eldon.

(*n*) *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & R. 200, S. C.; *Slaymaker v. Gundacker's Ex.*, 10 Serg. & Raw. 75.

(*o*) *Slater v. Lawson*, 1 B. & Ad. 396; *Hathaway v. Haskell*, 9 Pick. 24.

(*p*) *Dan v. Brown*, 4 Cowen, 483, 492.

no such privity among the members of a board of public officers (*q*), or among several indorsers of a promissory note (*r*), or between executors and heirs or devisees (*s*), as to make the admissions of one binding on all. After what has been said it is scarcely necessary to add, that in an action on the case for negligence, in an action of trespass, or in any other action for tort, the admission of one defendant will not be evidence against the other (*t*); and it is abundantly clear that the same rule prevails in criminal proceedings, as there can be no partnership or joint interest in crime (*u*).

§ 532. There is one apparent exception to this last proposition, where the *inhabitants of townships*, counties, or other territorial divisions of the country, sue or are prosecuted *eo nomine*; but in these cases, they are regarded in the light of a corporation, of which each individual inhabitant forms a component part; and therefore it is entirely consistent with the rule stated above, to hold that the declarations and admissions of any one of such persons should be receivable in evidence against the collective body. It has consequently been decided on an indictment against a township for non-repair of a bridge, that the declarations of all rateable inhabitants, whether actually rated or not, may be given in evidence for the Crown, though the value of such evidence will of course vary according to the knowledge and position of the declarant, and will in many cases be exceedingly slight (*v*). So also, in settlement cases, declarations by rated parishioners will be evidence against the parish (*w*). Nor is it necessary first to call the inhabitant, and show that he refuses to be examined, in order to admit his declarations (*x*); for this rule of evidence is in no way affected by the statutes rendering quasi corporators, or other interested

(*q*) *Lockwood v. Smith*, 5 Day, 309.

(*r*) *Slymaker v. Gundacker's Ex.*, 10 Serg. & Raw. 75.

(*s*) *Osgood v. Manhattan Co.*, 3 Cowen, 611.

(*t*) *Daniels v. Potter*, M. & M. 501, per Tindal, C. J.; *Morse v. Royal*, 12 Ves. 362, per Lord Erskine. See *R. v. Hardwick*, 11 East, 585, where Lord Ellenborough lays down the rule somewhat too loosely.

(*u*) *Grant v. Jackson*, Pea. R. 204, per Lord Kenyon.

(*v*) *R. v. Adderbury East*, 5 Q. B. 187, 189, n. (*a*); *R. v. Hardwick*, 11 East, 586, per Lord Ellenborough.

(*w*) *R. v. Hardwick*, 11 East, 579.

(*x*) *R. v. Whitley Lower*, 1 M. & Sel. 636; *R. v. Woburn*, 10 East, 395.

parties, competent witnesses (y). These acts, by removing certain disabilities which formerly existed, enable parties to the record, in some cases, to testify on *behalf* of themselves and others, but they do not provide that such persons shall be *compelled* to give evidence *against* themselves (z).

§ 533. It is obvious that an *apparent joint interest is not sufficient* to render the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy*. A foundation must first be laid, by showing, *prima facie*, that a joint interest exists. Where, therefore, an action was brought against a party for money had and received, and the plaintiff, in order to prove the receipt of the money by the defendant, tendered in evidence certain statements, which had been made by a person whom the defendant had taken into partnership subsequently to the transaction in question, the Court rejected the evidence of these statements, on the ground that a joint liability could not be presumed from the mere fact of a subsequent partnership (a). Again, the existence of a joint interest which is disputed, cannot be established by the admission of one of the parties sought to be charged, but this fact must be established by independent proof. Therefore, in an action against three makers of a promissory note, the joint execution of which was the point in issue, the admission of his signature by one defendant was held not sufficient to entitle the plaintiff to recover against him and the others, though theirs had been proved; the point to be established against all being a joint promise by all (b). And where it is sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others, to prove the partnership; but it is only after the partnership is shown to exist by independent proof satisfactory to the judge, that the admissions of one of the parties are received in order to affect the others (c). As, however, the admissions are evidence against the

(y) See 27 Geo. 3, c. 29; 54 Geo. 3, c. 170, § 9; 3 & 4 Vict. c. 25; 6 & 7 Vict. c. 85.

(z) *R. v. Adderbury East*, 5 Q. B. 187.

(a) *Catt v. Howard*, 3 Stark. R. 3, 5, per Abbott, C. J.

(b) *Gray v. Palmer*, 1 Esp. 135.

(c) *Nicholls v. Dowding*, 1 Stark. R. 81; *Gibbons v. Wilcox*, 2 Stark. R. 43;

party making them, he will be bound thereby, either in an action brought against him as surviving partner, or even, if he be sued on the joint promise with his co-partners, provided they have been outlawed, or have let judgment go by default (*d*).

§ 534. In general, the *answer* of one defendant in *Chancery* cannot be read in evidence against his co-defendant; the reason being, that, as there is no issue between them, there can have been no opportunity for cross-examination (*e*); and, moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage (*f*). But this rule does not apply to cases where the other defendant claims through the party whose answer is offered in evidence; nor to cases where they have a joint interest, either as partners or otherwise, in the transaction (*g*). Wherever the admission of any party would be good evidence against another, in such case, his answer may, *a fortiori*, be read against the latter (*h*).

§ 535. Where parties sue or are sued in a *representative* character, it may be questionable how far statements made by them *before they were completely clothed with that character*, will be admissible against them, so as to affect the interests of the persons they represent. In one case, Chief-Justice Tindal is reported to have received an admission of a person, who was suing as the assignee of a bankrupt, though made before he became such (*i*); but there is a contrary ruling by Lord Tenterden on precisely the same point (*k*); and in weighing the respective merits of these

Grant v. Jackson, Pea. R. 204, per Lord Kenyon; Van Reimsdyk v. Kane, 1 Gall. 635; Harris v. Wilson, 7 Wend. 57; Burgess v. Lane, 3 Greenl. 165.

(*d*) Sangster v. Mazarredo, 1 Stark. R. 161, per Lord Ellenborough; Ellis v. Watson, 2 Stark. R. 453, 478, per Abbott, C. J.

(*e*) Jones v. Turberville, 2 Ves. 11; Morse v. Royal, 12 Ves. 355, 361, 362; Greasley v. 24; Leeds v. Marine Ins. Co. of Alexandria, 2 Wheat. 380; Field v. Holland, 6 Cranch, 8; Hill v. Adams, 2 Atk. 39; Chervet v. Jones, 6 Mad. 268.

(*f*) Wych v. Meal, 3 P. Wms. 311.

(*g*) Petherick v. Turner, cited 1 Taunt. 104; Pritchard v. Draper, 1 R. & Myl. 191; Hiliard v. Phaley, 8 Mod. 180; Field v. Holland, 6 Cranch, 8, 24; Clark's Ex. v. Van Reimsdyk, 9 Cranch, 153, 156.

(*h*) Van Reimsdyk v. Kane, 1 Gall. 630, 635.

(*i*) Smith v. Morgan, 2 M. & Rob. 257.

(*k*) Fenwick v. Thornton, M. & M. 51. See also Plant v. M'Ewen, 4 Conn. 544.

decisions, the reader will probably be of opinion that Lord Tenterden's was correct. It certainly appears to be a somewhat startling proposition, that the assets of a testator, and the consequent rights of legatees, may be affected by some inconsiderate statement, which the executor, before the death of the testator, may have been induced to make; and the more so, when we reflect that even the sworn admission of a married woman, answering to a bill in Chancery jointly with her husband, cannot, after his death, be read against her, it being considered as the answer of the husband alone (*l*). Neither can the answer of the guardian of an infant defendant in Chancery be read against the infant in another suit (*m*); though it may be used against the guardian himself, if he afterwards be sued in his private capacity, for it is his own admission upon oath (*n*).

§ 536. We are next to consider the admissions of persons not parties to the record, but yet *interested in the subject-matter of the suit*. The law, in regard to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record. Thus, the admissions of the cestui que trust of a bond, so far as his interest and that of the trustee are identical (*o*); those of the persons interested in a policy effected in another's name for their benefit (*p*); those of the ship-owners, in an action by the master for freight (*q*); those of the indemnifying creditor, in an action against the sheriff (*r*); those of the deputy-sheriff tending to charge himself, in an action against the high sheriff for the misconduct of the deputy (*s*);

(*l*) *Hodgson v. Merest*, 9 Price, 563; *Elston v. Wood*, 2 Myl. & K. 678.

(*m*) *Eccleston v. Speke*, alias *Petty*, 3 Mod. 258; 2 Ventr. 72; Carth. 79; Comb. 156, S. C.; *Hawkins v. Luscombe*, 2 Swanst. 392, cases cited in n. (*a*); Story Eq. Pl. § 668; *Gresley Ev.* 24, 323; *Mills v. Dennis*, 3 Johns. Ch. 367.

(*n*) *Beasley v. Magrath*, 2 Sch. & Lef. 34.

(*o*) *Hanson v. Parker*, 1 Wils. 257. See also *Harrison v. Vallance*, 1 Bing. 45; 7 Moore, 304, S. C.; *May v. Taylor*, 6 M. & Gr. 266, per Maule, J.

(*p*) *Bell v. Ansley*, 16 East, 143, per Lord Ellenborough.

(*q*) *Smith v. Lyon*, 3 Camp. 465.

(*r*) *Dowden v. Fowle*, 4 Camp. 38; *Proctor v. Lainson*, 7 C. & P. 629, per Lord Abinger; *Dyke v. Alridge*, cited 7 T. R. 665; 11 East, 584; *Young v. Smith*, 6 Esp. 121; *Harwood v. Keys*, 1 M. & Rob. 204.

(*s*) *Snowball v. Goodricke*, 4 B. & Ad. 541, questioning the language of Lord

those of rated parishioners, in a settlement appeal, where the churchwardens and overseers of the poor are the nominal parties on the record (*t*); and, in short, those of any persons who are represented in the cause by other parties,—are receivable in evidence against their respective representatives (*u*). On this ground, it has been repeatedly held by committees on election petitions, that the declarations of voters against their own votes, whether made before or after the votes were given (*v*), and even though invalidating their votes on the ground of their having received bribes (*w*), are admissible in evidence; for, in a scrutiny, each case is considered as a separate cause, in which the supporter of the vote under discussion and the voter are the parties on the one side, and the opposers of the vote are the parties on the other (*x*).

§ 537. In all these cases, the declarations or admissions must have been made while the party making them had some interest in the matter; and they are receivable in evidence only so far as his own interests are concerned. Thus the declaration of a bankrupt, made before his bankruptcy, is good evidence to charge his estate with a debt; but not so, if it were made afterwards (*y*). While the declarant is the only party in interest, no

Kenyon and Lawrence, J., in *Drake v. Sykes*, 7 T. R. 113, which seems to identify the sheriff with the under-sheriff to all intents. *Yabsley v. Noble*, 1 Lord Raymond, 190. The declarations of under-sheriffs, or of the sheriff's bailiffs, accompanying official acts, are admissible as parts of the *res gestæ*. See *Jacobs v. Humphrey*, 2 Cr. & Mee. 413; 2 Tyrw. 272, S. C.; *Scott v. Marshall*, 2 Cr. & Jer. 238; *North v. Miles*, 1 Camp. 390, per Lord Ellenborough; and ante, § 395, et seq.

(*t*) *R. v. Hardwick*, 11 East, 579; *R. v. Whitley Lower*, 1 M. & Sel. 636.

(*u*) In *Hart v. Horn*, 2 Camp. 92, which was an action of replevin, the declarations of the person, under whom the defendant made cognizance, were rejected by Heath, J., as evidence for the plaintiff; but it is presumed that this case is not law. See *Welstead v. Levy*, 1 M. & Rob. 138.

(*v*) *Southampton case*, Cock. & Rowe, 113—117; *Perry & Knapp*, 225, S. C.; *Ripon, C. & R.* 301; *P. & K.* 211, S. C.; *Petersfield case*, C. & R. 34; *P. & K.* 49, S. C.; *New Windsor, Knapp & Ombler*, 173, 174; *Ennis*, id. 435; *Droitwich*, id. 64; *Bedfordshire*, 2 Luders, 411; other cases cited, 2 Rogers on Elect. 138.

(*w*) *Ipswich, Knapp & O.* 387—389; and cases cited 2 Rog. on Elect. 139.

(*x*) 2 Rog. on Elect. 139.

(*y*) *Bateman v. Bailey*, 5 T. R. 513; *Smith v. Simmes*, 1 Esp. 330; *Deady v. Harrison*, 1 Stark. R. 60. See also *Harwood v. Keys*, 1 M. & Rob. 304, and *Kempland v. Macauley*, Pea. R. 66, per Lord Kenyon.

harm can possibly result from giving full effect to his admissions. He may be supposed best to know the extent of his own rights, and to be least of all disposed to concede away any that actually belong to him. But admissions made after other persons have bonâ fide acquired separate rights in the same subject-matter, cannot be received to disparage their title, however they may affect that of the declarant himself. This most just and equitable doctrine will be found to apply not only to admissions made by bankrupts and insolvents, but to the cases of vendor and vendee, payee and indorsee, grantor and grantee, and, generally, to be the pervading doctrine, in all cases of rights acquired in good faith previous to the time of making the admissions in question (y). For instance, if an action be brought by trustees, who represent the interests of a variety of cestuis que trust, the statements of the person beneficially interested as tenant for life cannot be received as evidence for the defendant, so as to prejudice the rights of the remaindermen in fee. Indeed, before the declaration of a cestui que trust will be admitted at all against a trustee, the nature of the interest of the declarant in the trust estate must be shown, so that it may clearly appear that he alone is entitled to the benefit resulting from the action (z).

§ 538. In some cases, the admissions of *third persons, strangers to the suit*, are receivable. This arises when the issue is substantially upon the mutual rights of such persons at a particular time; in which case the practice is to let in such evidence in general, as would be legally admissible in an action between the parties themselves. Thus, in an action against the sheriff, either for not arresting a debtor on mesne process and making a false return of non est inventus, or for an escape on mesne process (a), any such

(y) *Welstead v. Levy*, 1 M. & Rob. 138; *Bartlett v. Delprat*, 4 Mass. 702, 708; *Clark v. Waite*, 12 Mass. 439; *Bridge v. Eggleston*, 14 Mass. 245, 250, 251; *Phenix v. Ingraham*, 5 Johns. 412; *Packer v. Gonsalus*, 1 Serg. & R. 526; *Patton v. Goldsborough*, 9 Serg. & R. 47; *Babb v. Clemson*, 12 Serg. & R. 328.

(z) *Doe v. Wainwright*, 8 A. & E. 691, 699, 700; 3 N. & M. 598, S. C.; *May v. Taylor*, 6 M. & Gr. 261.

(a) As to the special circumstances under which a debtor may still be arrested on mesne process, see 1 & 2 Vict. c. 110, §§ 1, 3, 4.

acknowledgment of the debt by the debtor as would have been sufficient to have charged him in the original action, will also, as against the sheriff, support the averment in the declaration, that the party not arrested, or escaping, was so indebted (*b*). So, an admission of joint liability by a third person, has been held sufficient evidence, on the part of the defendant, to support a plea in abatement for the nonjoinder of such person as defendant in the suit; it being admissible in an action against him for the same cause (*c*). The admissions, too, of a bankrupt, made before the act of bankruptcy, are receivable in proof of the petitioning creditor's debt; but his declarations made after the act of bankruptcy, though admissible against himself (*d*), form an exception to this rule, because of the intervening rights of creditors, and the danger of fraud (*e*).

§ 539. The admissions of a third person are also receivable in evidence against the party who has *expressly referred another to him* for information in regard to an uncertain or disputed matter. In such cases the party is bound by the declarations of the person referred to, in the same manner, and to the same extent, as if they were made by himself. Thus, upon a plea of plene administravit, where the executors wrote to the plaintiff, that if she wished for further information in regard to the assets, she should apply to a certain merchant in the city, they were held bound by the replies of the merchant to her inquiries upon that subject (*f*). So, in assumpsit for goods sold, where the fact of the delivery of them by the carman was disputed, and the defendant said, "If he will say

(*b*) *Sloman v. Herne*, 2 Esp. 695; *Williams v. Bridges*, 2 Stark. R. 42; *Kemp-land v. Macauley*, Pea. R. 65; *Rogers v. Jones*, 7 B. & C. 89, per Bayley, J.

(*c*) *Clay v. Langslow*, M. & M. 45, per Abbott, C. J.

(*d*) *Jarrett v. Leonard*, 2 M. & Sel. 265.

(*e*) *Hoare v. Coryton*, 4 Taunt. 560; 2 Rose, 158; *Robson v. Kemp*, 4 Esp. 234; *Watts v. Thorpe*, 1 Camp. 376; *Smallcombe v. Bruges*, McClell. R. 45; 13 Price, 136, S. C.; *Taylor v. Kinloch*, 1 Stark. R. 175; 2 Stark. R. 594. The dictum of Lord Kenyon, in *Dowton v. Cross*, 1 Esp. 168, that the admissions of the bankrupt made after the act of bankruptcy, but before the commission issued, are receivable, is contradicted in 13 Price, 153, 154, and overruled by that and the other cases above cited. See also *Bernasconi v. Farebrother*, 3 B. & Ad. 372.

(*f*) *Williams v. Innes*, 1 Camp. 364, per Lord Ellenborough.

that he delivered the goods, I will pay for them ;" he was held bound by the affirmative reply of the carman (*g*).

§ 540. In the application of this principle it matters not whether the question referred be one of law or of fact ; whether the person to whom reference is made, have or have not any peculiar knowledge on the subject ; or whether the statements of the referee be adduced in evidence in an action on contract, or in an action for tort. Therefore, where two parties had agreed to abide by the opinion of counsel upon the construction of a statute, the party against whose interest the opinion operated, was held bound thereby in a subsequent action (*h*) ; and a disputed fact regarding a mine, having been referred by consent to a miner's jury, their decision was received in evidence, when one of the disputants afterwards brought an action on the case against his adversary (*i*). In these cases the decisions, which partook of the nature of awards, were not stamped ; but the Court held that this was immaterial, as the instruments, not containing any recital of the agreements, did not on their face purport to be awards. The doctrine under discussion may further be illustrated by the case of *Downs v. Cooper* (*k*). There the defendant had demised premises to the plaintiff, who entered and paid him rent. During the term a brother of the defendant's disputed his title, and to avoid litigation between brothers, both, within the knowledge of the plaintiff, agreed to abide by the opinion of a barrister, to whom a case was submitted. The opinion being adverse to the defendant, he thereupon gave up his title deeds, and permitted his brother's attorney to tell the plaintiff, that in future he must regard the brother as his landlord. The plaintiff paid his rent accordingly ; but the defendant, being subsequently dissatisfied with the barrister's opinion, levied a distress, and an action of replevin was the consequence. The above facts being stated in the plea in bar, the Court held, that, though in general a tenant is estopped from denying his landlord's

(*g*) *Daniel v. Pitt*, Pea. Add. R. 238 ; 1 Camp. 366, n. ; 6 Esp. 74, S. C. ; *Brock v. Kent*, 1 Camp. 366, n. ; *Burt v. Palmer*, 5 Esp. 145 ; *Hood v. Reeve*, 3 C. & P. 532.

(*h*) *Price v. Hollis*, 1 M. & Sel. 105.

(*i*) *Sybray v. White*, 1 M. & W. 435 ; Tyr. & Gr. 746, S. C. (*k*) 2 Q. B. 256.

title, he was not so here, inasmuch as the conduct of the defendant amounted to an admission that his title had expired.

§ 541. In order to render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words ; but it will suffice if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. Therefore, where a party, on being questioned by means of an interpreter, gave his answers through the same medium, it has been held that the language of the interpreter should be considered as that of the party ; and that, consequently, it might be proved by any person who heard it, without calling the interpreter himself (*l*). So, if a party, on motion before a judge, uses the affidavit of another person, such affidavit is on any subsequent trial evidence as against him of the facts deposed to therein, and that, too, though the person who made the affidavit is present in court (*m*) ; and where a petitioning creditor, knowing that his servant could prove an act of bankruptcy, sent him expressly for that purpose to be examined at the opening of the fiat, the depositions so made were held to be evidence of the act of bankruptcy, as against the petitioning creditor, where that fact was put in issue in an action brought against him by the assignees (*n*). It has even been held, apparently on the authority of these cases, that, where the question in an action of trespass was whether the plaintiff or defendant was the tenant of a field, the deposition of a witness who, in a proceeding before justices for an alleged trespass on the same close, had been called by the plaintiff to prove his possession, but had in fact disproved it, might be put in evidence for the defendant, though the witness was alive (*o*). In this case, however, as the witness was abroad at the time of the trial, and as the litigants and the matter in dispute before the justices were identical with those before the Court, the depositions would seem to have been admissible, rather as secondary evidence of oral testimony (*p*) than as admissions by the accredited agent of

(*l*) *Fabrigas v. Mostyn*, 20 How. St. Tr. 122, 123, per Gould, J.

(*m*) *Brickell v. Hulse*, 7 A. & E. 454 ; *Johnson v. Ward*, 6 Esp. 47, per Chambre, J. But see *White v. Dowling*, 8 Ir. Law R. 128.

(*n*) *Gardner v. Moulton*, 10 A. & E. 464.

(*o*) *Cole v. Hadley*, 11 A. & E. 807.

(*p*) Ante, § 343.

the plaintiff. In this last light they could scarcely have been viewed, consistently with the opinion of the Court, as expressed in *Gardner v. Moulton* (q), or *Brickell v. Hulse* (r); for in both these cases the judges expressly admitted, that a party was not bound by what his witness might say at *Nisi Prius*, any more than he would be by depositions which he had used in Chancery without knowing their contents; and other authorities are not wanting to show that such depositions are inadmissible (s).

§ 542. Whether the answer of a person thus referred to is *conclusive* against the party does not seem to have been settled. Where the plaintiff had offered to rest his claim upon the defendant's affidavit, which was accordingly made, Lord Kenyon held that he was conclusively bound, even though the affidavit were false; and he added, that, to make such a proposition and afterwards to recede from it, was not only a dishonest act, but was one which might be turned to very improper purposes, such as to entrap the witness, or to find out how far the party's evidence would go in support of his case (t). But in a later case, where the question was whether a horse in the defendant's possession was identical with one lost by the plaintiff, and the plaintiff had said that if the defendant would take his oath that the horse was his, he should keep him; and he made oath accordingly; Lord Tenterden observed, that, considering the loose manner in which the evidence had been given, he would not receive it as conclusive; though it was a circumstance on which he should not fail to remark to the jury (u). And certainly the opinion of Lord Tenterden, indicated by what fell from him in this case, more perfectly harmonises with other parts of the law, especially as it is opposed to any further extension of the doctrine of estoppels, which precludes the investigation of truth. The purposes of justice and policy are sufficiently

(q) 10 A. & E. 468, per Lord Denman, and Patteson, J.

(r) 7 A. & E. 456—458, per Lord Denman, and Coleridge, J.

(s) *Rushworth v. Countess of Pembroke*, Hard. 472; *Atkins v. Humphreys*, 1 M. & Rob. 523. See also *R. v. Latchford*, 6 Q. B. 567.

(t) *Stevens v. Thacker*, Pea. R. 187; *Lloyd v. Willan*, 1 Esp. 178; *Bretton v. Prettiman*, Sir T. Raym. 153; *Delesline v. Greenland*, 1 Bay, 458, where the oath of a third person was referred to.

(u) *Garnet v. Ball*, 3 Stark. R. 160.

answered, by throwing the burthen of proof on the opposing party, as in the case of an award, and by holding him bound, unless he can impeach the test referred to by clear proof of fraud or mistake (*v*).

§ 543. It may here be expedient to examine briefly how far the admissions of a married woman can be received in evidence, either against herself or her trustees, or for or against her husband. First, if a wife sue or be sued as a single woman, no valid reason can be given why her admissions should not have the same legal effect as those of any other person; but in one case, where the defence to an action of assumpsit was that the plaintiff was under coverture when the cause of action accrued, Lord Ellenborough is reported to have held, on what grounds it does not appear, that it was not sufficient to show that she had acknowledged herself to be married, without proof of an actual marriage, or at least of cohabitation (*w*). Secondly, if the trustees of a married woman sue or be sued, and the opposite party be a stranger, her admissions, like those of an ordinary cestui que trust (*x*), would, it is apprehended, be clearly admissible; but if the husband be the hostile party, they can no more be received on either side than could her *vivâ voce* testimony; for the same principle of policy which excludes the one would equally invalidate the other; and, therefore, where an action was brought against a husband by the trustees of his wife under a separation deed, for arrears of maintenance, and the defence rested on the fact of the wife's adultery, it was held that proof of her admission of criminal misconduct could not be received (*y*). Thirdly, the admissions of a wife cannot be received in evidence for her husband, unless perhaps in the single event of their constituting part of the *res gestæ*. An instance of their admissibility on this ground is afforded by the case of *Walton v. Green* (*z*), where, in an action of assumpsit for goods supplied to a wife who had been turned out of doors by her husband the defendant, evidence was admitted, in support of a defence which relied on her previous adultery, that she had confessed her guilt to a third party; as it appeared to have been partly in consequence of this

(*v*) *Whitehead v. Tattersall*, 1 A. & E. 491.

(*w*) *Wilson v. Mitchell*, 3 Camp. 393.

(*y*) *Scholey v. Goodman*, 1 Bing. 349.

(*z*) See ante, § 536.

(*z*) 1 C. & P. 621, per Abbott, C. J.

confession that she had been put away by her husband. This case is here noticed, more out of respect for the eminent judge who decided it, than because it appears to rest upon any sound principle of law. The question was not whether the husband had reason to suspect his wife's fidelity, but whether she had in fact committed adultery; and to allow her admissions to establish that fact, and thus to screen her husband from the claims of a stranger, would seem to be opposed, not only to the rule of law which excludes the testimony of a wife on behalf of her husband (*a*), but also to that which rejects hearsay evidence. In actions for criminal conversation, the rule excluding the confession of the wife is the more especially necessary to be strictly enforced, as the admission of such evidence would open a wide door to the grossest collusion (*b*).

§ 544. On this last ground, the *House of Lords*, in proceedings upon *bills of divorce*, will, in general, reject letters from the wife to the husband containing confessions of adultery (*c*), unless they be offered in confirmation of circumstances which tend strongly to prove the defendant's guilt (*d*). It seems, however, that such letters, if addressed to a stranger, or even to the husband's agent, may be received in evidence, after proof that they were not written in consequence of any threat or promise, and that the writer was then living apart from her husband (*e*); and it further seems, that the wife's oral confession of guilt to a third party is admissible, at least as confirmatory evidence (*f*). Not only are direct confessions rejected in the House of Lords, except under the circumstances above stated, but all letters written by the wife after her separation, either to the husband or to the adulterer, are generally held inadmissible, unless they are connected with some particular fact (*g*), or can be referred to as part of the *res gestæ* (*h*), or are tendered in evidence after a *prima facie* case of guilt has been already

(*a*) See further upon this subject, post, Chapter *On Competency of Witnesses*.

(*b*) B. N. P. 28.

(*c*) Lord Cloncurry's case, Macq. Pr. in House of Lords, 606.

(*d*) Doyly's case, id. 654. See id. 536, 537.

(*e*) Lord Cloncurry's case, id. 606.

(*f*) Lord Ellenborough's case, id. 655. But see Wiseman's case, id. 631.

(*g*) Dundas' case, id. 610.

(*h*) Boydell's case, id. 651.

established. In one case, where the husband held a situation at Malta, and his wife, in consequence of bad health, had left the island, and had resided in England for several years, during which time she had lived with a paramour and had borne him four children, the House of Lords admitted a series of letters from the wife to her husband, which were tendered as accounting for the circumstance of her not going out to rejoin him, and as showing that she had practised upon him the grossest deceit (i).

§ 545. In the *Ecclesiastical Courts* a less strict rule obtains than is observed in the common-law courts, with respect to the exclusion of a *wife's confession*. By a canon (k) passed in 1603, a mere confession, indeed, unaccompanied by other circumstances, is rendered insufficient to support a prayer for a separation a mensâ et thoro; and this rule has been held applicable, though the confession was made under the apprehension of approaching dissolution, and was free from all suspicion of a collusive purpose (l). Still, the confession is always admissible in evidence, and if coupled with other facts of a suspicious nature, will generally prove an important ingredient in the decision of the Court. In a late case, letters from the wife to the supposed paramour, taken in conjunction with other suspicious circumstances, were, in the absence of direct proof, considered to establish her guilt, though they contained no express avowal of adultery, and never reached the hands of the party to whom they were addressed, having been intercepted by the husband (m). Whether the wife's confession of adultery would be sufficient in itself to repel a suit instituted by her for restitution of conjugal rights, is still an undecided point (n); but,

(i) *Miller's case*, Macq. Pr. in House of Lords, 620—623.

(k) No. 105.

(l) *Mortimer v. Mortimer*, 2 Hagg. Cons. R. 316.

(m) *Grant v. Grant*, 2 Curt. Ec. R. 16, affirmed in Pr. Co. 1840. In the Ecclesiastical Courts, letters from the alleged paramour, found in the wife's possession, are admissible; but if they do not necessarily imply the commission of adultery, or are not supported by other evidence of indecent familiarities, they are insufficient to support a sentence of separation. *Hamerton v. Hamerton*, 2 Hagg. Ec. R. 8. As to the admissibility of letters written by the adulterer to the wife, in proceedings before the House of Lords, see *Lord Glerawley's case*, Macq. Pr. in House of Lords, 629.

(n) *Mortimer v. Mortimer*, 2 Hagg. Cons. R. 310; *Burgess v. Burgess*, id. 227.

in a suit of nullity of marriage, by reason of a former marriage, the simple admission of such former marriage will not suffice (o).

§ 546. Fourthly, the *admissions of the wife* will *bind* the husband, only where she had authority to make them (p). This authority does not result, by mere operation of law, from the relation of husband and wife; but is a question of fact, to be found by the jury, as in other cases of agency; for though this relation is peculiar in its circumstances, from its close intimacy and its very nature, yet there is nothing peculiar in the principles of law which apply to it. As the wife is seldom expressly constituted the agent of the husband, the cases on this subject are almost universally those of implied authority, turning upon the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question. Where he sues for her wages, the mere fact, that she earned them, does not authorise her to bind him by her admissions of payment (q); nor can her unauthorised declarations affect him, even where he sues with her in her right; for in these, and similar cases, the right is his own, though acquired through her instrumentality (r). In regard to the inference of her agency from circumstances, the question used to be left to the jury with great latitude, both as to the fact of agency, and the time of the admissions. Thus, it has been held competent for them to infer authority in her to accept a notice and direction, in regard to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-room, appearing to conduct his business relating to that transaction, and once giving orders to the foreman (s). And in an action against the husband for goods furnished to the wife while in the country, where he occasionally visited her, her

(o) *Searle v. Price*, 2 Hagg. Cons. R. 189.

(p) *Emerson v. Blonden*, 1 Esp. 142.; *Anderson v. Sanderson*, 2 Stark. R. 204; *Carey v. Adkins*, 4 Camp. 92; *Meredith v. Footner*, 11 M. & W. 202.

(q) *Hall v. Hill*, 2 Str. 1094.

(r) *Alban v. Pritchett*, 6 T. R. 680; *Kelly v. Small*, 2 Esp. 716; *Denn v. White*, 7 T. R. 112, as to her admission of a trespass. Neither are his admissions as to facts respecting her property, which happened before the marriage, receivable, after his death, to affect the rights of the surviving wife. *Smith v. Scudder*, 11 Serg. & Raw. 325.

(s) *Plimmer v. Sells*, 3 Nev. & M. 422.

letter to the plaintiff, admitting the debt, and apologising for the nonpayment, though written several years after the transaction, was held by Lord Ellenborough, previous to Lord Tenterden's act (*t*), sufficient to take the case out of the Statute of Limitations (*u*). Of late years, however, a greater strictness has prevailed; and in the case of *Meredith v. Footner* (*v*), where a wife, by her husband's authority, carried on the business of a shop, and attended to all the receipts and payments, the Court held that admissions made by her to the landlord of the shop respecting the amount of rent were not admissible to bind the husband. Had the admissions related to the receipt of shop goods, they would have been evidence; but the fact that she was conducting a business for her husband, did not constitute her his agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for the future occupation of it.

§ 547. The admissions of *attornies of record* bind their clients, in all matters relating to the progress and trial of the cause. In some cases they are conclusive, and may even be given in evidence upon a new trial; though, previously to such trial, the party gives notice that he intends to withdraw them, or though the pleadings are altered, provided the alterations do not relate to the admissions (*x*). But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial (*y*).

§ 548. Another class of admissions comprehends those which attornies make, not, indeed, with the express intent of dispensing

(*t*) 9 Geo. 4, c. 14, § 1, which renders it necessary that an acknowledgment, to take the case out of the statute, should be in writing, "signed by the party chargeable thereby." See ante, § 528.

(*u*) *Gregory v. Parker*, 1 Camp. 394; *Palethorp v. Furnish*, 2 Esp. 511, n.; *Clifford v. Burton*, 1 Bing. 199; 8 Moore, 16, S. C.; *Petty v. Anderson*, 3 Bing. 170; *Cotes v. Davis*, 1 Camp. 485.

(*x*) *Elton v. Larkins*, 1 M. & Rob. 196, per Tindal, C. J.; 5 C. & P. 385, S. C.; *Doe v. Bird*, 7 C. & P. 6, per Lord Denman; *Langley v. E. of Oxford*, 1 M. & W. 608.

(*y*) See cases cited in last note. Also *Young v. Wright*, 1 Camp. 141, per Lord Ellenborough.

with proof of certain facts, but as it were *incidentally*, while they are referring to other matters connected with the cause. These, which are generally the result of carelessness, though not regarded as conclusive admissions, are still considered, not unfrequently, as raising an inference respecting the existence of facts, which the adversary would otherwise have been called upon to prove; and, consequently, it is very important that attorneys should exercise great caution in the language they employ while corresponding with their opponents. Thus, where in an action against the acceptor of a bill, his attorney had served notice on the plaintiff to produce all papers relating to a bill, the description of which corresponded with that set forth in the declaration,—“which said bill”, the notice went on to state, “*was accepted by the said defendant*,”—the Court held that such notice was *prima facie* evidence of the defendant's acceptance (*z*); and in an action against the owners of a ship, their joint ownership was inferred from an undertaking to appear for them, signed by their attorney, in which they were described as owners of the sloop in the question (*a*). Again, where the defendant's attorney, in an action of debt on a bond, had admitted the signature of the attesting witness; this was held, by implication, to amount to an admission of the due execution of the instrument (*b*).

§ 549. Admissions, however, contained in the *mere conversation* of an attorney, cannot be received against the client, though they relate to the facts in controversy. The reason of this distinction is found in the nature and extent of the authority given, the attorney being constituted for the management of the cause in court, and for nothing more (*c*). So, if a letter, sent by an attorney to the opposite party, be expressed to be written “*without prejudice*,” it cannot be received as an admission; neither can the reply be admitted, though not guarded in a similar manner (*d*). If the admission were made

(*z*) *Holt v. Squire*, Ry. & M. 282, per Abbott, C. J.

(*a*) *Marshall v. Cliff*, 4 Camp. 133, per Lord Ellenborough.

(*b*) *Milward v. Temple*, 1 Camp. 375, per Lord Ellenborough.

(*c*) *Young v. Wright*, 1 Camp. 139, 141; *Parkins v. Hawkshaw*, 2 Stark. R. 239; *Doe v. Richards*, 2 C. & Kir. 216. See *Wilson v. Turner*, 1 Taunt. 398. *Yvallon v. King* 2 L.R. 608

(*d*) *Paddock v. Forrester*, 3 Scott, N. R. 734. See *Jardine v. Sheridan*, 2 C. & Kir. 24.

before suit, it will be equally binding, provided it be shown that the attorney was already retained to appear in the cause (e). But in the absence of any evidence of retainer at that time in the cause, there must be some other proof of authority to make the admission (f). When the attorney is already constituted in the cause, admissions made by his managing clerk, or his agent, are received in his own (g).

§ 550. The practice of attorneys making solemn admissions before a trial, for the purpose of dispensing with the mere formal proof of documents, has of late years greatly prevailed; and this salutary course has been adopted in consequence of several *rules of court*, the combined effect of which has been materially to diminish the expenses of law suits, and thus to confer no trifling benefit upon suitors. So early as the year 1832, it was ordered by the 6th & 7th general rules of Hilary Term (h), "that the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission. And, further, that the expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a judge, a reasonable time before the trial, (such summons stating therein the name, description, and place of abode of the intended witness,) have neglected or refused to admit such handwriting or execution, or unless the judge, upon attendance before

(e) *Marshall v. Cliff*, 4 Camp. 183, per Lord Ellenborough; *Gainsford v. Grammar*, 2 Camp. 9, per id.

(f) *Wagstaff v. Wilson*, 4 B. & Ad. 339; *Burghart v. Angerstein*, 6 C. & P. 695, per Alderson, B.; *Pope v. Andrews*, 9 C. & P. 564, per Coleridge, J.

(g) *Taylor v. Willans*, 2 B. & Ad. 845, 856; *Standage v. Creighton*, 5 C. & P. 406; *Griffiths v. Williams*, 1 T. R. 710; *Truslove v. Burton*, 9 Moore, 64; *Taylor v. Forster*, 2 C. & P. 195.

(h) Reg. Gen. 2 Will. 4, reported in 3 B. & Ad. 392, 393.

him, shall indorse upon such summons that he does not think it reasonable to require such admission."

§ 551. In 1834, the judges further ordered (i), "that either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form thereto annexed (k), or to the like effect, of his *intention to adduce in evidence certain written or printed documents*; and unless the adverse party shall consent, by indorsement on such notice, within

(i) Reg. Gen. H. T. 4 Will. 4, r. 20, reported in 5 B. & Ad. xvii., xviii.

(k) Form of the notice referred to:—

In the Q. B. }
C. P. } A. B. v. C. D.
or Exchequer. }

Take notice that the plaintiff [*or*, defendant] in the cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or*, plaintiff] his attorney or agent, at _____, on _____, between the hours of _____; and that the defendant [*or*, plaintiff] will be required to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent, or delivered, were served, sent, or delivered respectively; *saving all just exceptions to the admissibility of all such documents as evidence* in this cause. Dated, &c.

G. H., attorney for plaintiff [*or*, defendant].

To E. F., attorney or agent for defendant [*or*, plaintiff].

[Here describe the documents; the manner of doing which may be as follows:]

ORIGINALS.

Description of Documents.	Date.
Deed of covenant between A. B. and C. D. first part, and E. F. second part	1st Jan., 1828.
Indenture of lease from A. B. to C. D.	1st Feb., 1828.
Indenture of release between A. B. & C. D. first part, &c.	2nd Feb., 1828.
Letter of defendant to plaintiff	1st March, 1828.
Policy of insurance on goods by ship Isabella, on voyage from Oporto to London	3rd Dec., 1827.
Memorandum of agreement between C. D., captain of said ship, and E. F.	1st Jan., 1828.
Bill of exchange for 100 <i>l</i> ., at three months, drawn by A. B. on, and accepted by, C. D., indorsed by E. F. and G. H.	1st May, 1829.

forty-eight hours, to make the *admission* specified, the party requiring such admission may call on the party required, by summons, to show cause before a judge why he should not consent to such admission; or, in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause. Provided that, if the judge shall think the application unreasonable, he shall indorse the summons accordingly. Provided also, that the judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit. If the party required shall consent to the admission, the judge shall order the same to be made. No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or

COPIES.

Description of Documents.	Date.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of A. B. in the parish of X. }	1st Jan., 1808.	{ Sent by General Post, 2nd Feb., 1828.
Letter of plaintiff to defendant.	1st Feb., 1828.	
Notice to produce papers	1st March, 1828.	{ Served 2nd March, 1828, on defendant's attorney, by E. F., of —.
Record of a judgment of the Court of King's Bench, in an action, J. S. v. J. N. }	Trinity term, 10 Geo. 4.	
Letters patent of King Charles II. in the Rolls' Chapel }	1st Jan., 1680.	

neglected to make such admission, or the judge shall have indorsed upon the summons, that he does not think it reasonable to require it. A judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause."

§ 552. It will now be convenient to refer to a few cases which have been decided on the construction of these rules; and, first, it has been held, that, though the notice must be given a reasonable time before trial, yet, where it was given to the defendant's agent in town only four days before the commission day at Newcastle,—and he, two days afterwards, refused to admit the documents without objecting to the sufficiency of the notice, or requiring further time,—the plaintiff was entitled to the costs of proof (*l*). Secondly, though the order be made "with a saving of all just exceptions to the admissibility of the documents," the admission so far recognises their general character and accuracy, that where a deed was admitted as "the counterpart of a lease," an objection taken at the trial, that it was in fact a lease, and as such inadmissible for want of a sufficient stamp, was overruled (*m*); and where a party admitted an instrument, which was specified in the notice as bearing date the 10th August, he was not allowed to call on his opponent for an explanation, though on the production of the instrument it was evident that the date, "August," had been written on an erasure (*n*). Thirdly, a variance in the description of the document, if not of a nature to mislead, will not release the admitting party from his obligation; as, for instance, where the date of a promissory note, which was otherwise correctly described in the notice to admit, was misstated (*o*). Fourthly, it seems that a judge will not certify, so as to entitle the party to the costs of proving any document specified in the notice, unless the witness who has been called to establish this proof, has, at

(*l*) *Tinn v. Billingsley*, 2 C. M. & R. 253; 3 Dowl. 810, S. C.

(*m*) *Doe v. Smith*, 8 A. & E. 255; 3 N. & P. 335; 2 M. & Rob. 7, S. C.

(*n*) *Poole v. Palmer*, C. & Marsh. 69, per Rolfe, B.

(*o*) *Field v. Hemming*, 7 C. & P. 619, per Lord Abinger; 5 Dowl. 450, S. C. nom. *Field v. Flemming*; *Bittleston v. Cooper*, 14 M. & W. 399.

least in his examination in chief, been questioned to no other fact (*p*).

§ 553. Fifthly, it is needless to show that the admitting party has actually inspected the documents mentioned in the notice, if he has had an opportunity of doing so (*q*); and it seems to be unnecessary to prove, that the document produced at the trial is the same with that seen at the judge's chambers, provided it corresponds with the description contained in the notice (*r*). On two occasions, however, the necessity for such evidence was urged by counsel, if not acknowledged by the Court (*s*); and prudence may generally dictate the propriety of being prepared with such proof, or, at least, of having the documents that are to be produced signed by the judge, or annexed to the order and referred to thereby in a corresponding manner. Sixthly, though the order to admit contain no saving of all just exceptions, the party admitting may still rely on any valid objection to the admissibility of a document specified in the notice; and, therefore, where a plaintiff admitted that a paper was a copy of a letter from himself to a defendant, who had suffered judgment by default, this did not entitle the other defendant to put in the copy, without first accounting for the non-production of the original, or tracing it to the plaintiff's possession, and proving the notice to produce. The judge's order in this case merely secured the accuracy of the secondary evidence, but did not give it the effect of primary proof (*t*). Seventhly, if at the trial, the party, by refusing to admit pursuant to the order, obtain a verdict, or nonsuit his opponent, the Court will grant a new trial, and make him pay all the preceding expenses (*u*); and perhaps, also, in a flagrant case, he would be liable to an attachment, and his attorney be made to

(*p*) *Stracey v. Blake*, 7 C. & P. 404, per Lord Abinger.

(*q*) *Doe v. Smith*, 8 A. & E. 264, 265, per Patteson and Coleridge, Ja.

(*r*) *Id.* per Coleridge, J., who observed, that "to require such evidence would be multiplying proofs, so as to defeat the rule of Court."

(*s*) *Clay v. Thackrah*, 9 C. & P. 53, coram Lord Denman; *Doe d. Tindal v. Roe*, 5 Dowl. 420, per Lord Abinger.

(*t*) *Sharpe v. Lamb*, 11 A. & E. 805, 807; 3 P. & D. 454, S. C. See *Goldie v. Shuttleworth*, 1 Camp. 70.

(*u*) *Doe d. Tindal v. Roe*, 5 Dowl. 420, per Coleridge, J.

pay costs. Eighthly, though the Court has no jurisdiction under the rules to order the admission of documents, yet, at the request of the judge at chambers, they will hear the argument, and communicate their opinion to him, leaving him to pronounce the judgment (*x*). And, lastly, under these rules, a party may be ordered to admit a foreign judgment, or other documents in a foreign court, his opponent giving him time to inspect them abroad, and paying his expenses incurred in so doing (*y*). But ancient records of a public nature, which require translation and explanation, as also affidavits filed in Chancery, which are used at a trial for the purpose of checking the testimony of the deponents, are not within the rules; and, consequently, a plaintiff was held entitled to the costs, both of a witness who was called to explain and translate the records, and of an officer of the Court of Chancery who produced the affidavits, though the defendant had not been called upon to admit any one of these documents (*z*).

§ 554. In consenting to admit under these rules, care must be taken, lest, by the words used in the notice to admit, the party admitting should be entrapped into making a larger admission than he intended. The defendants fell into this error in the late case of *Wilkes v. Hopkins* (*a*). That was an action against three persons on a bill of exchange alleged to have been accepted by them under the style of "the Newbridge Coal Company." The acceptance was traversed by two of the defendants, while the third, one Bishop, who had actually signed the acceptance for the company, suffered judgment by default. At the trial, the two defendants who had pleaded, denied that Bishop had any authority to accept for them; but as the notice to admit stated the bill to have been "accepted by Bishop *for the defendants* as the Newbridge Coal Company," the Court held, that this admission, not only acknowledged the signature of Bishop, but precluded the defendants from denying that he had authority to bind them by his acceptance.

§ 555. Admissions made by *counsel* stand on much the same

(*x*) *Smith v. Bird*, 3 Dowl. 641.

(*z*) *Bastard v. Smith*, 10 A. & E. 213.

(*y*) *Id.*

(*a*) 1 Com. B. 737.

footing as those made by attorneys; and therefore, where a special case had been signed by the junior barrister on each side, but, as a material fact had been omitted, a new trial was granted, the case was regarded by the Court as containing the admissions of the parties to the facts therein stated, and its production was held to dispense with a second proof of those facts (*b*). Again, where counsel on both sides so conduct a cause, as to lead to an inference that a certain fact is admitted between them, the jury may treat it as proved (*c*); and though the counsel do so, with respect to some fact which goes to support one issue only, that fact, it seems, may be taken for granted for all purposes, and as to the whole case (*d*). So, where a plaintiff's counsel in his opening stated that his client had paid a particular cheque, but called no evidence in support of that fact, the defendant was allowed to give secondary evidence of the contents of the cheque after notice to produce, without giving further proof of the plaintiff's possession (*e*). In the case of *Colledge v. Horn* (*f*), it was sought to carry this doctrine one step further; and on a second trial the defendant endeavoured to avoid part of his opponent's demand, by proving an admission, which, on the former trial, had been made in the plaintiff's presence by the plaintiff's counsel in his opening address to the jury. The judge rejected this evidence; and although the court above subsequently granted a new trial, they did not do so on the ground that the ruling was wrong, but because the facts were not sufficiently before them. Mr. Justice Burrough, indeed, felt no difficulty in saying, that, if the plaintiff was in court, and heard what his counsel said, and made no objection, he was bound by the statement; but the other learned judges, with more prudence, forebore giving any opinion on a question, which they held to be one of great nicety. It was urged, with much *truth* at least, in support of the judge's ruling, that statements made by a counsel in the course of his address to the jury are often no other than embellishments of the imagination; and it was contended, that, as bills in equity are not

(*b*) *Van Wart v. Wolley*, Ry. & M. 4, per Abbott C. J.; *Edmunds v. Newman*, id. 5, n. per id.

(*c*) *Stracy v. Blake*, 1 M. & W. 168.

(*d*) *Bolton v. Sherman*, 2 M. & W. 403, per Lord Abinger.

(*e*) *Duncombe v. Daniell*, 8 C. & P. 222, 227, per Lord Denman. But see *Machell v. Ellis*, 1 C. & Kir. 682.

(*f*) 3 Bing. 119; 10 Moore, 431, S. C.

evidence against the parties who file them, inasmuch as they are supposed to be the suggestions of counsel, so the speeches of barristers should clearly be rejected. Should these arguments not be considered convincing, there are some learned members of the profession, who, if duly watched, will often save their adversaries much trouble in the way of proof.

§ 556. We are next to consider the admissions of a *principal*, as evidence in an action *against the surety* upon his collateral undertaking. In the cases on this subject the main inquiry has been, whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*. If so, they have been held admissible; otherwise, not. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done; and therefore is entitled to proof of his conduct by original evidence, where it can be had; excluding all declarations of the principal, made subsequent to the act to which they relate, and out of the course of his official duty. Thus, where one guarantied the payment for such goods as the plaintiffs should send to another in the way of their trade; the admissions of the principal debtor, that he had received goods, made after the time of their supposed delivery, were held inadmissible in evidence against the surety (*g*). So, if one becomes surety in a bond, conditioned for the faithful conduct of another as clerk, or collector, it is held, that, in an action on the bond against the surety, confessions of embezzlement, made by the principal after his dismissal, are not receivable in evidence (*h*); though entries made by him in the course of his duty, or whereby he charged himself with the receipt of money, would, at least after his death, be received as proof against the surety (*i*). It has also been held in America,

(*g*) *Evans v. Beattie*, 5 Esp. 26, per Lord Ellenborough; *Bacon v. Chesney*, 1 Stark. R. 192, per id.; *Longenecker v. Hyde*, 6 Binn. 1.

(*h*) *Smith v. Whittingham*, 6 C. & P. 78. See also *Cutler v. Newlin*, Mann. Dig. N. P. 137, per Holroyd, J.; *Dunn v. Slee*, Holt's N. P. R. 401; *Dawes v. Shed*, 15 Mass. 6, 9; *Foxcroft v. Nevens*, 4 Greenl. 72; *Hayes v. Seaver*, 7 Greenl. 237; *Beall v. Beck*, 3 Har. & McHen. 242.

(*i*) *Whitnash v. George*, 8 B. & C. 556; *Middleton v. Melton*, 10 B. & C. 317; *Goss v. Watlington*, 3 B. & B. 132; 6 Moore, 355, S. C.; *McGahey v. Alston*, 2. M. & W. 213, 214.

that, in an action against a surety, a judgment obtained against the principal may be admitted as evidence of that fact (*k*); and further, that whenever a surety confides to his principal the power of making a contract, he confides to him also the power of furnishing evidence of the contract when made; and, consequently, if the contract be by parol, subsequent declarations of the principal are admissible in evidence, though not conclusive. Thus, where a husband and wife agreed by articles to live separate, and C., as trustee and surety for the wife, covenanted to pay the husband a sum of money upon his delivering to the wife a carriage and horses for her separate use; it was held, in an action by the husband for the money, that the wife's admissions of the receipt by her of the carriage and horses were admissible (*l*). So, where A. guarantied the performance of any contract which B. might make with C., the admissions and declarations of B. were held admissible against A., to prove the contract (*m*).

§ 557. The principle to be deduced from these cases would, perhaps, not be recognised in England to its full extent; but the language of Chief Justice Dallas may be cited, to show that in some cases the receipt of a principal may be evidence against his surety. "There might," said his Lordship, "be an authority actually given, which would justify the reception of such evidence; there might be an authority implied from the circumstances of the case" (*n*). It may also be doubtful, whether the declarations of a principal might not be evidence against the surety, in a case where the latter, being sued for the default of the former, gives him *notice of the pendency* of the suit, and requests him to defend it; for here, if judgment goes against the surety, the record is conclusive evidence for him, in a subsequent action against the principal for indemnity, inasmuch as the principal has thus *virtually become* a party to the suit. This view of the law is at least in accordance with a ruling of Lord Kenyon, which cannot be supported on any other ground. A sheriff had brought an action

(*k*) *Drummond v. Prestman*, 12 Wheat. 515.

(*l*) *Fenner v. Lewis*, 10 Johns. 38.

(*m*) *Meade v. McDowell*, 5 Binn. 195.

(*n*) *Goss v. Watlington*, 3 B. & B. 138. See *Ward v. Suffield*, 5 Bing. N. C. 381.

against the surety of his bailiff, who had kept back some money which he had received; and his Lordship held, that a written admission by the bailiff of the receipt of this money was evidence against the surety, as the bailiff was substantially the defendant in the action (*o*).

§ 558. The admissions of one person are also evidence against another, in respect of privity between them. The term *privity* denotes mutual or successive relationship to the same rights of property; and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate; as, donor and donee, lessor and lessee, joint-tenants, and successive bishops, rectors, and vicars; privies in blood; as, heir and ancestor, and coparceners; privies in representation; as, executors and testators, administrators and intestate; privies in law; where the law, without privity of blood or estate, casts the land upon another, as, by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law (*p*). The ground, upon which admissions bind those in privity with the party making them, is, that they are identified in interest; and of course the rule extends no farther than this identity. The cases of coparceners and joint-tenants are assimilated to those of joint promissors, partners, and others having a joint interest, which have already been considered (*q*). In other cases, where the party by his admissions has qualified his own right, and another claims to succeed him, as heir, executor, or the like, the latter succeeds only to the right as thus qualified at the time when his title commenced; and the admissions are receivable in evidence against the representative, in the same manner as they would have been against the party represented. Thus, the declarations of the ancestor,

(*o*) *Perchard v. Tindall*, 1 Esp. 394.

(*p*) Co. Lit. 271 a; *Carver v. Jackson*, 4 Peters, 1, 83; Wood's Inst. LL. Eng. 236; Tomlin's Law Dict. in Verb. *Privies*. Other divisions have been recognised; viz. privity in tenure, between landlord and tenant; privity in contract alone, or the relation between lessor and lessee, or heir and tenant in dower, or by the curtesy, by the covenants of the latter, after he has assigned his term to a stranger; privity in estate alone, between the lessee and the grantee of the reversion; and privity in both estate and contract, as between lessor and lessee, &c.; but these are foreign from our present purpose. See *Walker's case*, 3 Co. 23; *Beverley's case*, 4 Co. 123, 124; ante, § 73.

(*q*) Ante § 525.

that he held the land as the tenant of a third person, are admissible to show the seisin of that person, in an action brought by him against the heir for the land (*r*). And the declarations of an intestate are admissible against his administrator, or any other claiming in his right (*s*); but it has been held, that the declarations of an executor, though made while he was acting in that capacity, are not admissible against a special administrator, who has been appointed in consequence of the executor's protracted absence from England (*t*).

§ 559. Again, any declaration by a landlord in a prior lease, which is relative to the matter in issue, and concerns the estate, has been received in evidence against a lessee, who claims by a subsequent title (*u*); and admissions, whether evidenced by letters, receipts, cases drawn for the opinion of counsel, answers in Chancery, or verbal statements, if made by former bishops, rectors, or vicars, with regard to their several rights, will be evidence against their respective successors, in all cases where the same rights are in question (*v*). So, where a vicar had filed a bill against his rector and certain landowners of the parish for tithe hay, and had subsequently abandoned the suit, the defendants in their answer having declared that the tithes in question belonged to the rector, it was held, in an action for similar tithes brought by a succeeding rector against owners, who had purchased their lands from the parties to the former suit, that the answer was strong evidence in favour of the plaintiff (*w*). . . So, ancient maps, books of survey, and the like, though mere private documents, are frequently admissible on this ground, where there is a privity in estate between the former proprietor under whose direction they were

(*r*) *Doe v. Pettett*, 5 B. & A. 223; 2 Poth. on Obl. by Evans, p. 254; *Ante*, §§ 478—481, and cases there cited.

(*s*) *Smith v. Smith*, 3 Bing. N. C. 29; 7 C. & P. 401, S. C.

(*t*) *Rush v. Peacock*, 2 M. & Rob. 162, per Lord Denman. There the administrator was appointed under the act of 38 Geo. 3, c. 87.

(*u*) *Crease v. Barrett*, 1 C. M. & R. 932. See *Doe v. Seaton*, 2 A. & E. 171.

(*v*) *Bp. of Meath v. Marq. of Winchester*, 3 Bing. N. C. 183; *Maddison v. Nuttall*, 6 Bing. 226; 3 M. & P. 544, S. C.; *Doe v. Cole*, 6 C. & P. 359, per *Patteson, J.*; *De Whelpdale v. Milburn*, 5 Price, 485.

(*w*) *Lady Dartmouth v. Roberts*, 16 East, 334.

made, and the present claimant against whom they are offered (*w*). The declarations, also, of former owners or occupiers, made while in possession, have been admitted as evidence of the nature and extent of their title, against those claiming in privity of estate (*x*).

§ 560. The question how far the admissions of tenants may be received in evidence against their landlords is not very distinctly ascertained; but, although in one case at Nisi Prius it has been held, that the receipts of a lessee of vicarial tithes were evidence, in proof of a modus, against the vicar, by reason of the privity between them (*y*); and though in an action of ejectment, the admission of the tenant in possession will, from the peculiar form of the proceedings, be evidence against one who defends as landlord, and enters into the consent rule in that character (*z*); yet it seems that, in general, the naked declarations of a tenant will not be evidence against the reversioner (*a*); and it has been expressly held, that the declarations of a former occupier of the defendant's land were not admissible against him, on an issue whether the plaintiff had an easement in such land (*b*).

§ 561. The same principle holds in regard to *admissions made by the assignor* of a personal contract or chattel previous to the assignment, where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer. In such case, he is bound by the previous admissions of the assignor in disparagement of his own apparent title. But this is true only where there is an identity of interest between the assignor and assignee; and such identity is deemed to exist, not only where the latter is expressly the mere agent and representative of the former (*c*), but also where the assignee has acquired

(*w*) *Bridgman v. Jennings*, 1 Lord Raym. 734; B. N. P. 283, a.

(*x*) *Woolway v. Rowe*, 1 A. & E. 114; 3 N. & M. 849, S. C.; *Walker v. Broadstock*, 1 Esp. 458; *Doe v. Austin*, 9 Bing. 41; *Davies v. Pierce*, 2 T. R. 53; *Doe v. Jones*, 1 Camp. 367; *Jackson v. Bard*, 4 Johns. 230, 234; *Norton v. Pettibone*, 7 Conn. 319; *Weidman v. Kohr*, 4 Serg. & Raw. 174.

(*y*) *Jones v. Carrington*, 1 C. & P. 329, 330, per Park, J.

(*z*) *Doe v. Litherland*, 4 A. & E. 784; 6 N. & M. 313, S. C.

(*a*) *Tickle v. Brown*, 4 A. & E. 378, per Patteson, J.

(*b*) *Scholes v. Chadwick*, 2 M. & Rob. 507, per Cresswell, J.

(*c*) *Welstead v. Levy*, 1 M. & Rob. 138; *Harrison v. Vallance*, 1 Bing. 45;

a title with actual notice of the true state of that of the assignor, as qualified by the admissions in question, or where he has purchased a demand already stale, or otherwise infected with circumstances of suspicion.

§ 562. Thus, in an action by the indorsee of a bill or note, which has been taken by the plaintiff after it was due, or without consideration, and with notice of fraud in its original concoction, the declarations of the indorser, made while the interest was in him, are admissible in evidence for the defendant (*d*). But, on the other hand, the declarations of a former holder of a note, showing that it was given without consideration, though made while he held the note, are not admissible against the indorsee, to whom the instrument has been transferred on good consideration, and before it was overdue; for such an indorsee derives his title from the nature of the instrument itself, and not through the previous holder; and as Mr. Justice Parke properly observed, "the right of a person, holding by a good title, is not to be cut down by the acknowledgment of a former holder, that he had no title" (*e*). In applying this rule, a note payable on demand, though not negotiated for some time after its date, will not on that account be treated as a note taken by an indorsee when over due; for such notes are intended to be continuing securities, and may circulate for years without exciting suspicion (*f*). Neither will the circumstance that the declarations of the prior holder would, if received, prove his fraud in connection with the indorsee, render them admissible against the latter; because all preliminary facts, which are necessary to establish the admissibility of evidence, must be proved aliunde, before such evidence is received (*g*).

Gibblehouse v. Stong, 3 Rawls, 437; *Hatch v. Dennis*, 1 Fairf. 244; *Saelgrove v. Martin*, 2 M'Cord, 241, 243.

(*d*) *Beauchamp v. Parry*, 1 B. & Ad. 89; *Peckham v. Potter*, 1 C. & P. 231, per Lord Gifford; *Benson v. Marshal*, cited in *Shaw v. Broom*, 4 D. & Ry. 731; *Shirley v. Todd*, 9 Greenl. 83.

(*e*) *Woolway v. Rowe*, 1 A. & E. 116, explaining *Barough v. White*, 4 B. & C. 325; 6 D. & R. 379, S. C.; *Smith v. De Wruitz*, Ry. & M. 212, per Abbott, C.J.; *Beauchamp v. Parry*, 1 B. & Ad. 89.

(*f*) *Barough v. White*, 4 B. & C. 325; *Brooks v. Mitchell*, 9 M. & W. 15.

(*g*) *Phillips v. Cole*, 10 A. & E. 106, 112; 2 P. & D. 268, S. C.

§ 563. The case of *Ivat v. Finch* (*h*) appears to have been decided, in part, on the same principle. That was an action of trespass for taking three mares, the property of the plaintiff. The defendant, who was lord of the manor, justified under a heriot custom; and the sole question between the parties was, whether one Alice Watson, the tenant, was possessed of the mares at the time of her death. The plaintiff contended that she had given them to him some time before, and tendered in evidence her declarations to that effect. These were rejected at the trial, but the Court above held that they were admissible, as they were against her interest, and the right of the lord depended upon her title. But where the fact of this dependence is not directly raised by the issue, such declarations will be inadmissible; and therefore, in *Stotherd v. James* (*i*), where an issue was directed to try, whether goods seized in A.'s house at the suit of the defendant were the property of the plaintiff, the declarations of A. respecting the property were held to be inadmissible; inasmuch as on that narrow issue, the defendant would succeed, whether the goods belonged to A. or to any other person besides the plaintiff. Had the issue raised the question, whether the goods belonged to A. at the time of the execution, it would seem, on principle, that his declarations made before the seizure would have been evidence against the defendant; though on an issue similar to that which was raised in *Stotherd v. James*, Mr. Justice Wightman is reported to have rejected the debtor's admissions, on the dubious ground that the execution creditor claimed *adversely* to him (*k*).

§ 564. These admissions by third persons, as they derive their value and legal force from the relation of the party making them to the property in question, may be *proved by any competent witness*, who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive, (and it seldom is so), may be controverted by other testimony; even by calling the party himself, when competent; but it is not necessary to produce him;

(*h*) 1 Taunt. 141.

(*i*) 1 C. & Kir. 121, per Maule, J.

(*k*) *Prosser v. Gwillim*, 1 C. & Kir. 96.

his declarations, when admissible at all, being received as original evidence, and not as hearsay (*l*).

§ 565. We are next to consider *the time and circumstance* of the admission; and we may preface our observations on this head by observing, that, whenever the declarations of a third person are offered in evidence, on the ground that the party against whom they are tendered derives his title from such person, it must be shown that they were made at a time, when the declarant had an interest in the property in question; because it is manifestly unjust, that a person, who has parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make (*m*). Thus, the admission of a former party to a bill of exchange, made after he has negotiated it, cannot, under any circumstances, be received against the holder (*n*); and where a person had, by a voluntary postnuptial settlement, conveyed away his interest in an estate, and afterwards had executed a mortgage of the same property, it was held, that his admission that money had actually been advanced upon the mortgage could not be received on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void (*o*).

§ 566. Next, we may repeat what has before been briefly noticed (*p*), that *confidential overtures of pacification*, and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*, are excluded on grounds of public policy (*q*). For without this protective rule, it would often be difficult to take any step towards an amicable compromise or adjustment, and as Lord Mansfield has observed, it must be

(*l*) Ante, §§ 390, 411, and cases there cited; *Woolway v. Rowe*, 1 A. & E. 114; 3 N. & M. 849, S.C.; *Brickell v. Hulse*, 7 A. & E. 454.

(*m*) *Doe v. Webber*, 1 A. & E. 740, per Lord Denman.

(*n*) *Pocock v. Billing*, 2 Bing. 269; *Shaw v. Broom*, 4 D. & R. 730. See *Roberts v. Justice*, 1 C. & Kir. 93.

(*o*) *Doe v. Webber*, 1 A. & E. 733; 3 N. & M. 586, S.C.; *Gully v. Bp. of Exeter*, 5 Bing. 171.

(*p*) Ante § 549.

(*q*) *Cory v. Bretton*, 4 C. & P. 462, per Tindal, C. J.; *Healey v. Thatcher*, 8 C. & P. 388; *Paddock v. Forrester*, 3 Scott, N. R. 734; *Jardine v. Sheridan*, 2 C. & Kir. 24.

permitted to all men to buy their peace, without prejudice to them should the offer not succeed; such offers being made to stop litigation, without regard to the question whether anything is due or not. If therefore the defendant, on being sued for 100*l.*, should offer the plaintiff 20*l.*, and at the same time state that such offer was made without prejudice, this is not admissible in evidence, for it is irrelevant to the issue; it neither admits nor ascertains any debt, and is no more than saying he would give 20*l.* to be rid of the action (*g*). So, in equity, it has been held, that the giving of a small sum in order to obtain the release of a right, could not be considered as an acknowledgment that a right existed; it amounts only to this—"I give you so much for not seeking to disturb me" (*r*). Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession (*s*), will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appear to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being effected (*t*); though, in this case, if the admission be merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the cause, it will be received (*u*). The American courts have gone still further, and have held that evidence of the admission of any independent fact is receivable, though made during a treaty of compromise (*x*).

§ 567. In the absence of any express, or strongly implied, restriction as to confidence, an offer of compromise is clearly admissible as *some* evidence of liability (*y*); and although the offer of a less sum than the amount demanded, will not, in general, support a count on an account stated, inasmuch as it may be

(*g*) B. N. P. 236, b.

(*r*) *Underwood v. Lord Courtown*, 2 Sch. & Lef. 67, 68, per Lord Redesdale.

(*s*) *Thomson v. Austen*, 2 D. & Ry. 361, per Bayley, J.

(*t*) *Waldridge v. Kennison*, 1 Esp. 144, per Lord Kenyon. (u) *Id.*

(*x*) *Mount v. Bogert*, Anthon's R. 190, per Thompson, C. J.; *Murray v. Coster*, 4 Cowen, 635; *Fuller v. Hampton*, 5 Conn. 416, 426; *Sanborn v. Neilson*, 4 New Hamp. R. 501, 508, 509; *Delogny v. Rentoul*, 1 Martin, 175.

(*y*) *Wallace v. Small*, M. & M. 446, per Lord Tenterden; *Watts v. Lawson*, id. 447, n., per id.; *Nicholson v. Smith*, 3 Stark. R. 129, per id.

a mere offer to purchase peace (y);—nor, perhaps, will an offer by the drawer of a bill, who is threatened with legal proceedings upon it, to give another bill by way of settlement, obviate the necessity of proving at the trial that he has received due notice of dishonour (z);—yet there are occasions, as for instance, if the drawer of a bill, whose signature is in issue, has proposed a settlement, when the fact of an offer having been made may be entitled to considerable weight (a). In the case of *Thomas v. Morgan* (b), however, where the defendant was sued for keeping mischievous dogs, which had killed three of the plaintiff's cattle, and it appeared that on being told of the injury done by them he had offered to settle for it, the Court held, that though this was a fact, which in strictness should have been submitted to the jury as evidence of the scienter, it was entitled to little, if any, weight, "as it might have been made from motives of charity without any admission of liability at all." They therefore refused a new trial, though the question, whether the offer of compromise was not an admission of the defendant's liability, had not in point of fact been left to the jury, the attention of the judge at *Nisi Prius* not having been drawn to that particular point. After what has been said above, authorities need scarcely be cited to show, that admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual (c).

§ 568. Before leaving this subject we may add one word of caution respecting a man's purchasing peace, where his conduct, though strictly upright and honourable, may be subjected to misinterpretation. Such a course is always pusillanimous, seldom gains its immediate object, and if it fails, may be productive of irreparable injury to character. The counsel of a man who has once lent himself to such an arrangement, may feebly urge that he was actuated by motives of charity and benevolence; but the opponent

(y) *Wayman v. Hilliard*, 7 Bing. 101; 4 M. & P. 729, S. C.

(z) *Cuming v. French*, 2 Camp. 106, n., per Lord Ellenborough. See post, § 573.

(a) *Harding v. Jones*, Tyr. & Gr. 135.

(b) 2 C. M. & R. 496; 5 Tyr. 1085, S. C.

(c) *Gregory v. Howard*, 3 Esp. 113, per Lord Kenyon; *Slack v. Bachmann*, Pea. R. 5, per id.

will more loudly and successfully contend that his behaviour amounts to proof of a consciousness of misconduct; and the judge, while he rejects both these interpretations, will perform no easy task, should he induce the jury to ascribe it to the infirmity of one, who was reluctant to have his character and conduct questioned, and his name bandied about in the public papers. "Let this action," said Lord Ellenborough, when Sir William Scott was sued for illegally excommunicating one Beaurain, whose animosity he had endeavoured to stifle by a gift, "Let this action be a lesson for all men to stand boldly forward—to stand on their characters—and not, by compromising a present difficulty, to accumulate imputations on their honour" (*b*).

§ 569. In regard to admissions made under circumstances of *constraint*, the rule of law is this, that they cannot be received when obtained by imposition or illegal duress (*c*); but that they are admissible, at least on the trial of civil actions (*d*), if the compulsion under which they were made was legal. Thus, affidavits sworn by a party in former legal proceedings, answers filed by him in Chancery in a former suit, evidence given by him in an action at law, or his examination taken before commissioners of bankrupts, will be evidence against himself in a subsequent cause; and this, too, though his subsequent opponent was a stranger to the prior proceedings (*e*),—though he himself might, had he thought fit, have successfully demurred to the questions (*f*),—though they were irrelevant to the matter before the Court at the time of his examination, and were put to him for the purpose of procuring evidence in an action depending against him (*g*),—and though he

(*b*) Lord Eldon's Life, by Twiss, vol. ii., pp. 233—235, 2nd ed.

(*c*) *Stockfleth v. De Tastet*, 4 Camp. 11, per Lord Ellenborough; *Robson v. Alexander*, 1 M. & P. 448.

(*d*) As to their admissibility in *criminal* proceedings, see post, §§ 649—653.

(*e*) *Grant v. Jackson*, Pea. R. 203, per Lord Kenyon; *Ashmore v. Hardy*, 7 C. & P. 501, 504, per Patteson, J.

(*f*) *Smith v. Beadnell*, 1 Camp. 30, 33, per Lord Ellenborough.

(*g*) *Stockfleth v. De Tastet*, 4 Camp. 10. If the commission has been perverted to improper purposes, the remedy is by an application to have the examination taken from the files and cancelled, *id.* 11, per Lord Ellenborough.

had no opportunity of fully explaining the testimony he had given. This last point may be illustrated by the case of *Collett v. Lord Keith* (*h*), where, in an action for taking the plaintiff's ship, the testimony of the defendant, given as a witness in an action between other parties, in which he admitted the taking of the ship, was allowed to be proved against him; though it appeared that, in giving his evidence, when he was proceeding to state his reasons for taking the ship, the judge had stopped him by saying that it was unnecessary for him to vindicate his conduct. The manner in which the evidence had been obtained was matter of observation to the jury; but as what was said bore directly on the issue, it could not be excluded as evidence of the fact. So, where a defendant had been examined before commissioners of bankrupts, and, though the whole of what he said had not been taken down, yet the portion that was reduced to writing had been read over to him, and he had signed it, this was held to be receivable against him, as a statement of facts, the truth of which he had admitted (*i*). It seems that an admission obtained under a compulsory examination, will not be evidence of an *account stated*; but this probably rests on the ground that it is made to a third party, while to support an *account stated*, the admission must be made, either to the person to whom the money is owing, or to some one sent by him (*k*).

§ 570. Passing now to a consideration of the *nature* of admissions, it may be observed that there is no difference in regard to the admissibility of this sort of evidence, between direct admissions, and those which are *incidental*, or made in some other connexion, or involved in the admission of some other fact. One or two cases illustrative of this rule have already been noticed, while treating of admissions made by attornies (*l*); but it may here be added, that in an action by the assignees of a bankrupt against an auctioneer, to recover the proceeds of a sale of the

(*h*) 4 Esp. 212, per Le Blanc, J.

(*i*) *Milward v. Forbes*, 4 Esp. 171, per Lord Ellenborough.

(*k*) *Tucker v. Barrow*, 7 B. & C. 625, per Little Dale, J.; 3 C. & P. 90; 1 M. & Ry. 518, S.C.

(*l*) Ante, § 548.

bankrupt's goods, the defendant's advertisement of the sale, in which he described the goods as "the property of D., a bankrupt," was held to be a conclusive admission that D. was a bankrupt, and that the defendant was acting under his assignees (*m*). So where a party, with a view to suing out a commission of bankruptcy against a trader, made an affidavit that the trader owed him 100*l.*, and was become bankrupt, it was held that he could not afterwards dispute the bankruptcy, when he was himself sued in trover by the assignees of the bankrupt, appointed under a second commission, for the price of some flour which he had clandestinely received from the trader, and applied to the discharge of his own debt (*n*).

§ 571. Other admissions are *implied from assumed character*; for, whenever the existence of any domestic, social, or official relation is in issue, it is quite clear, that any recognition, whether by word or deed, of that relation, is *prima facie* evidence, against the person making such recognition, that that relation exists (*o*). This general rule is more frequently applied against a person, who has thus recognised the character or office of another; but it embraces, in its principle, any representations or language in regard to himself. Thus, to illustrate the second branch of the rule first, where one has *assumed to act in an official character*, this is an admission of his appointment or title to the office, so far as to render him liable, even criminally, for misconduct or neglect in such office (*p*). This doctrine has been held to apply, among other cases, to actions or prosecutions against clergymen, for non-residence (*q*); against military officers, for returning false musters (*r*); against popish priests, for remaining forty days within the kingdom, when this was considered an offence of no less magnitude than high

(*m*) *Maltby v. Christie*, 1 Esp. 342, as explained by Lord Ellenborough in *Rankin v. Horner*, 16 East, 193.

(*n*) *Ledbetter v. Salt*, 4 Bing. 623; *Harmar v. Davis*, 7 Taunt. 577. See post, § 618, *ad. fin.*

(*o*) *Dickinson v. Coward*, 1 B. & A. 677, 679, per Lord Ellenborough; recognised by Lord Lyndhurst in *Inglis v. Spence*, 1 C. M. & R. 436.

(*p*) See ante, § 111.

(*q*) *Bevan v. Williams*, 3 T. R. 635 (*a*), per Lord Mansfield.

(*r*) *R. v. Gardner*, 2 Camp. 513, per Lord Ellenborough.

treason (*r*); against letter-carriers, for embezzlement (*s*); and against attorneys (*t*), toll-gatherers (*u*), and collectors, for penalties (*v*).

§ 572. So, under the first branch of the rule, where one has *recognised the official character of another*, by treating with him in such character or otherwise, this is at least *prima facie* evidence of his title against the party thus recognising it (*w*). For instance, where a person had received credit from the renter of turnpike tolls, and had afterwards accounted with him in that character, and made him a partial payment, he was not permitted to question the legality of his appointment (*x*); and where a farmer-general of post-horse duties brought an action for certain statute penalties against a person who let out horses for hire, proof of his appointment was waived, the defendant having previously accounted with him as farmer-general (*y*). So, the clerk of the trustees of a turnpike road has not been allowed to show, that a person who had acted as one of the trustees, and had been treated as such by himself, while clerk, was not duly qualified (*z*); and in an action by the assignees of a bankrupt against a debtor, who has made them a partial payment (*a*), or has acknowledged their title in letters to the solicitor of the commission (*b*), the plaintiffs need not prove their title as assignees, though notice to dispute has been given. Again, where an attorney brought an action against a defendant for defamation, in charging him with swindling, and threatening to have him struck off the rolls, this threat was held to impart an admission that the plaintiff was an attorney (*c*); and in

(*r*) *R. v. Kerne*, 7 How. St. Tr. 714; *R. v. Brommich*, id. 722; *R. v. Atkins*, id. 728. The act of 27 Eliz. c. 2, under which these poor wretches were tried, is now repealed by 7 & 8 Vict. c. 102.

(*s*) *R. v. Borrett*, 6 C. & P. 124, per Littleale and Bosanquet, Js., and Bolland, B. The prisoner was indicted under 2 Will. 4, c. 4.

(*t*) *Cross v. Kaye*, 6 T. R. 663.

(*u*) *Trowbridge v. Baker*, 1 Cowen, 251.

(*v*) *Lister v. Priestly*, Wightw. 67.

(*w*) *Peacock v. Harris*, 10 East, 104.

(*x*) Ante, §§ 113, 114.

(*y*) *Radford v. M'Intosh*, 3 T. R. 632.

(*z*) *Pritchard v. Walker*, 3 C. & P. 212, per Vaughan, B.

(*a*) *Dickinson v. Coward*, 1 B. & A. 677.

(*b*) *Inglis v. Spence*, 1 C. M. & R. 432; *Crofton v. Poole*, 1 B. & Ad. 568.

(*c*) *Berryman v. Wise*, 4 T. R. 366.

a similar action brought by a physician, where the plaintiff was spoken of as "Doctor L.," and the defendant, who was an apothecary, had made up medicines prescribed by him, the Court of Common Pleas was equally divided upon the question, whether the defendant's words and conduct amounted to an acknowledgment of the plaintiff's character (*a*). In actions of this kind, however, if the words complained of charge a want of qualification and not mere misconduct, the plaintiff must prove that he possesses the character which has been impugned, for the slander in such case does not admit it (*b*). The case of *Lipscombe v. Holmes* (*c*) affords a good example of both branches of the rule in question. That was an action for work and labour as a surgeon; and the defence was that the plaintiff was a physician, and therefore incapable of maintaining an action for fees. It was shown that he had written prescriptions and signed himself M.D., upon which Lord Ellenborough was on the point of nonsuiting him, saying that "if a person passes himself off as a physician, he must take the character cum onere." It appearing, however, that the defendant had paid money into court, his Lordship thought that this act removed the objection, being tantamount to an admission of the plaintiff's right to sue as a surgeon.

§ 578. Admissions implied from the *conduct* of the party are governed by the same principles; and although this class of admissions has already been adverted to, while treating of the law of presumptions (*d*), it deserves further illustration in this place. Thus, the suppression of documents is an admission, that their contents were deemed unfavourable to the party suppressing them (*e*). The entry of a charge to a particular person in a tradesman's book, or the making out of a bill of parcels in his name,

(*a*) *Smith v. Taylor*, 1 New R. 196; *Sir James Mansfield, and Heath, J., aff., Rooke and Chambre, Js., neg.*

(*b*) *Id.* 207; *Collins v. Carnegie*, 1 A. & E. 703, per Lord Denman.

(*c*) 2 Camp. 441. See further on this subject, *R. v. Barnes*, 1 Stark. R. 243; *Cummin v. Smith*, 2 Serg. & R. 440; *Divoll v. Leadbetter*, 4 Pick. 220.

(*d*) *Ante*, §§ 88, 94, 95, 116.

(*e*) *James v. Biou*, and *Owen v. Flack*, 2 Sim. & St. 606, 607; *Bell v. Frankis*, 4 M. & Gr. 446; *Curlew v. Corfield*, 1 Q. B. 814; 1 G. & D. 489, S. C.

is an admission that the goods were furnished on his credit (*f*). The omission of a claim by an insolvent in a schedule of the debts due to him given in on oath, is an admission that it is not due; though whether it amounts to a conclusive admission may be a question of some doubt (*g*). Payment of money is an admission against the payer, that the receiver is the proper person to receive it; but not against the receiver, that the payer was the person who was bound to pay it; for the party receiving payment of a just demand, may well assume without inquiry, that the person tendering the money was the person legally bound to pay it (*h*). Relief given at various times to a pauper while residing in another parish, is cogent, though not conclusive evidence that he is settled in the relieving parish (*i*); and even a single instance of such relief having been given will warrant a similar conclusion (*k*). Of course the effect of such evidence will be much stronger, if the examination states a distinct head of settlement in the relieving parish, though the technical proof may fail to establish it satisfactorily (*l*). On the other hand, the relief of a pauper, while residing in the relieving parish, is no evidence whatever of a settlement, however frequently it may have been bestowed (*m*); but this rule rests, not so much on the absence of any presumption deducible from the conduct of the relieving parish, as on the impolicy of permitting such evidence to have

(*f*) *Storr v. Scott*, 6 C. & P. 241, per Lord Lyndhurst. See *Thomson v. Davenport*, 9 B. & C. 78, 86, 90, 91.

(*g*) In *Nicholls v. Downes*, 1 M. & Rob. 13, Lord Tenterden held it to be conclusive, apparently questioning *Hart v. Newman*, 3 Camp. 13, where Lord Ellenborough treated it as entitled to little weight. See *Tilghman v. Fisher*, 9 Watts, 441.

(*h*) *James v. Bion*, 2 Sim. and St. 606; *Chapman v. Beard*, 3 Anstr. 942.

(*i*) *R. v. Barnsley*, 1 M. & Sel. 377, 380, per Lord Ellenborough; *R. v. Wakefield*, 5 East, 335; *R. v. Stanley cum Wrenthorpe*, 15 East, 350; *R. v. East Winch*, 12 A. & E. 697; *R. v. Yarwell*, 9 B. & C. 894; 4 M. & R. 685, S.C.; *R. v. Carnarvonshire Js.*, 2 Q.B. 325. Formerly the relief must have been given by the churchwardens and overseers in order to furnish evidence against the parish, but the board of guardians now represent for this purpose every parish within the union. See *R. v. Crondall*, 2 Sess. Cas. 667.

(*k*) *R. v. Edwinstowe*, 8 B. & C. 671.

(*l*) *R. v. Bedingham*, 1 Sess. Cas. 114, per Lord Denman.

(*m*) *R. v. Chatham*, 8 East, 498; *R. v. Trowbridge*, 7 B. & C. 252; 1 M. & R. 7, S.C.; *R. v. Coleorton*, 1 B. & Ad. 26.

any weight; for if parish officers, by giving relief to a pauper, were to make evidence against themselves as to his settlement in their parish, they would perform their duty to casual poor with great reluctance (*n*). A distinct promise by the drawer to pay, or indeed any acknowledgment by him of liability upon, a dishonoured bill, will raise an inference that he has received due notice of dishonour, and, in the case of a foreign bill, that it has been duly protested (*o*); and a jury will be justified in coming to the same conclusion on less positive evidence; as for instance, if the drawer, in disclaiming liability, when threatened with an action, did not rest his defence on the want of notice, but on some different ground (*p*). The maxim, *expressum facit cessare tacitum*, will here raise a presumption, which a defendant may find it difficult to rebut. The suing (*q*) or distraining (*r*) for rent, accruing due since a forfeiture of which the lessor has notice, as also the mere acceptance of such rent, amounts to an acknowledgment of the tenancy on the part of the lessor, and is consequently a waiver of the forfeiture (*s*); though if the breach be a continuing one, as the using rooms in a prohibited manner, or the omitting to keep premises insured, the acceptance of rent after such breach will not waive the forfeiture incurred by subsequent user or omission (*t*).

§ 574. Admissions may also be implied from the *acquiescence* of the party. But acquiescence to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party (*u*). And whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully

(*n*) *R. v. Chatham*, 8 East, 501, per Lord Ellenborough; *R. v. Coleorton*, 1 B. & Ad. 27, per Bayley, J.

(*o*) *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229, 232; *Campbell v. Webster*, 2 Com. B. 258; *Patterson v. Becher*, 6 B. Moore, 319; *Brownell v. Bonney*, 1 Q. B. 39. See *Bell v. Frankis*, 4 M. & Gr. 446.

(*p*) *Wilkins v. Jadis*, 1 M. & Rob. 41, per Lord Tenterden; *Curlewis v. Corfield*, 1 Q. B. 814; 1 G. & D. 489, S. C. See ante, § 567.

(*q*) *Roe v. Minshall*, cited B. N. P. 96 (*c*). (*r*) *Doe v. Peck*, 1 B. & Ad. 428.

(*s*) *Doe v. Davids*, 2 Cowp. 804; *Roe v. Harrison*, 2 T. R. 480, 431; *Doe v. Allen*, 3 Taunt. 78; *Doe v. Rees*, 4 Bing. N. C. 384.

(*t*) *Doe v. Woodbridge*, 9 B. & C. 376; *Doe v. Peck*, 1 B. & Ad. 428; *Hyde v. Watts*, 12 M. & W. 254; *Doe v. Gladwin*, 6 Q. B. 963. See post, § 610.

(*u*) *Allen v. McKeen*, 1 Sumn. 314.

understood, by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated (*f*). Thus, where a landlord quietly suffers a tenant to expend money in making alterations and improvements on the premises, it is evidence of his consent to the alterations (*u*); though the mere lying by and passively witnessing a breach of covenant for several years, is not such an acquiescence as to amount to a waiver of the forfeiture (*w*). Again, if a tenant *personally* receives notice to quit at a particular day, without objection, it is generally an admission that his tenancy expires on that day (*x*); but if he cannot read, or even did not read the notice in the presence of the person serving it upon him, it will be treated as a service not personally served (*y*), and will go for nothing (*z*). Thus, also, a trader being inquired for, and hearing himself denied, may thereby commit an act of bankruptcy (*a*); and, in general, where one knowingly avails himself of another's acts done for his benefit, the jury will be justified in considering such conduct as an admission of his obligation to pay a reasonable compensation (*b*). So in settlement law, where two brothers, claiming derivative settlements from their father, were removed by successive orders, and the examination of the father proving his settlement was served upon the appellants together with the former order, against which there was no appeal, the fact of the appellants not objecting to the *ground of removal* when they received the first

(*f*) *Melen v. Andrews*, M. & M. 336; *Boyd v. Bolton*, 8 Ir. Eq. R. 113.

(*u*) *Doe v. Allen*, 3 Taunt. 78, 80; *Doe v. Pye*, 1 Esp. 366, per Lord Kenyon; *Neale v. Parkin*, 1 Esp. 229, per id. See also *Stanley v. White*, 14 East, 333.

(*w*) *Doe v. Allen*, 3 Taunt. 78. But see ante, § 573.

(*x*) *Doe v. Biggs*, 2 Taunt. 109; *Thomas v. Thomas*, 2 Camp. 647; *Doe v. Forster*, 13 East, 405; *Oakapple v. Copons*, 4 T. R. 361; *Doe v. Wombwell*, 2 Camp. 559, per Lord Ellenborough.

(*y*) *Doe v. Calvert*, 2 Camp. 388, per Lord Ellenborough, explained in 2 Camp. 648.

(*z*) *Thomas v. Thomas*, 2 Camp. 649; *Doe v. Forster*, 13 East, 405.

(*a*) *Key v. Shaw*, 8 Bing. 320.

(*b*) *Morris v. Burdett*, 1 Camp. 218, per Ellenborough, where a candidate, not bound by statute to pay for the hustings erected for an election, had made use of them; *Abbot v. Hermon*, 7 Greenl. 118, where a school-house was used by the school district; *Hayden v. Madison*, id. 76.

son, was held to be some slight evidence of an admission that the father was settled in their parish; and consequently, although on an appeal against the second order the first was inadmissible (c), the father's examination was received as part of the evidence of such admission (d).

§ 575. Again, the raising an objection to one item of an account, no remark being made as to the rest, will be evidence of an account stated as to those items, to which no objection has been made (e); and, *among merchants*, an account rendered will be regarded as allowed, if it be not objected to within a second or third post (f), or at least if it be kept for any length of time without making an objection (g). With respect to ordinary accounts, however, a distinction has been taken in Ireland between such as are *sent by post*, and those *delivered by hand*; and it has been held that the former, though kept by the party to whom they were sent without observation, are not admissible against him, as evidence that he had acquiesced in their contents (h). In the case where this point was determined, Chief Justice Bushe remarked, that what a party *says* upon an account furnished to him, or upon a statement made in his presence, may be given in evidence against him along with the account or statement, because what is thus offered is the act or declaration of the party to be affected by it, and the account or the statement is by reference made a part of such act or declaration; but the naked fact that an account remains in the possession of a party to whom it was sent, cannot amount to an acquiescence in its contents. His Lordship added, that the admission of such evidence would countenance the notion, that a man might, by furnishing an account claiming a balance against his *creditor*, establish an acquittance for himself (i).

(c) On the authority of *R. v. Duchess of Kingston*, 20 How. St. Tr. 638, n.

(d) *R. v. Sow*, 4 Q. B. 93.

(e) *Chisman v. Count*, 2 M. & Gr. 307.

(f) *Sherman v. Sherman*, 2 Vern. 276, per Hutchins, Ld. Com.

(g) *Willis v. Jernegan*, 2 Atk. 252, per Lord Hardwicke; *Tickel v. Short*, 2 Ves. Sen. 239, per id., where the account had been kept without objection for two years. See also, *Freeland v. Heron*, 7 Cranch, 147, 151; *Murray v. Toland*, 3 Johns. Cas. 575; *Coe v. Hatton*, 1 Serg. & R. 398; *M'Bride v. Watts*, 1 M'Cord, 384; *Corps v. Robinson*, 2 Wash. C. C. R. 388.

(h) *Price v. Ramsay*, 2 Jebb & Sym. 338.

(i) *Id.* 342, 343.

§ 576. The *same distinction* has been recognised in England between *letters* and *verbal statements*. “What is said to a man before his face,” observed Lord Tenterden in *Fairlie v. Denton* (*k*), “he is in some degree called on to contradict, if he does not acquiesce in it (*l*); but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains.” Lord Denman, also, in a later case declared, that “it was a great deal too broad a proposition to say that every paper which a man might hold, purporting to charge him with a debt or liability, was evidence against him if he produced it” (*m*).

§ 577. Letters, however, or other papers found in a party's possession, will occasionally in a civil suit be evidence against him, as raising an inference that he knows their contents and has acted upon them (*n*); and in criminal prosecutions, especially those for conspiracy and treason, letters and papers so found are frequently received, though their weight, as evidence against the prisoner, will in great measure depend on the fact, whether answers to them can be traced, or whether anything can be shown to have been done upon them (*o*). So, also, the opportunity of constant access to documents may sometimes, by raising a presumption that their contents are known, afford ground for affecting parties with an implied admission of the truth or correctness of such contents. Thus, the rules of a club, or a record of the proceedings of a society, contained in a book kept by the proper officer and accessible to the members (*p*),—charges against a club, entered by the servants of the house in a book kept for that purpose open in the club-room (*q*),—and the like,—are admissible against the members; their knowledge of the contents of the books, and their acquiescence therein, being presumable under the circumstances.

(*k*) 3 C. & P. 103.

(*l*) This doctrine, by the bye, would justify much speaking at St. Stephen's.

(*m*) *Doe v. Frankis*, 11 A. & E. 795. (*n*) *Hewitt v. Piggott*, 5 C. & P. 75.

(*o*) *R. v. Horne Tooke*, 25 How. St. Tr. 120, 121, per Eyre, C. J.; *R. v. Watson*, 2 Stark. 140; 32 How. St. Tr. 349, 351, S. C.

(*p*) *Raggett v. Musgrave*, 2 C. & P. 556, per Abbott, C. J.; *Alderson v. Clay*, 1 Stark R. 405, per Lord Ellenborough.

(*q*) *Wiltzie v. Adamson*, 1 Ph. Ev. 357.

§ 578. But in regard to admissions inferred from *acquiescence in the verbal statements of others*, the maxim, *Qui tacet, consentire videtur*, is to be applied with careful discrimination. "Nothing," it is said, "can be more dangerous than this kind of evidence. It should always be received with caution: and never ought to be received at all, unless the evidence is of direct declarations of that kind, which naturally calls for contradiction; some assertion made to the party with respect to his right, which by his silence he acquiesces in" (q). A *distinction* has accordingly been taken *between declarations made by a party interested*, and those made *by a stranger*; and while what one party declares to the other without contradiction is admissible evidence, what is said to a party by a third person may not be so. It may be impertinent, and best rebuked by silence (r). Still less will statements made by strangers in the presence of a party be admissible against him, if they be *not directly addressed* to him; because, in such case, he can scarcely under any circumstances be called upon to interfere. Therefore, where in a real action, upon a view of the premises by a jury, one of the chain-bearers was the owner of a neighbouring close, respecting the bounds of which the litigating parties had much altercation, their declarations in his presence were held inadmissible against him, in a subsequent action respecting his own close (s).

§ 579. Moreover, to affect one person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, but they must also have been made on an *occasion, when a reply from him might be properly expected* (t). Depositions, therefore, taken in the presence of a party during a judicial investigation, observations made by a magistrate to the parties before him, and confessions of an accomplice criminating his co-prisoner before the justices, will not in any subsequent trial, whether civil or criminal, be evidence against the party who heard them in silence; because in judicial

(q) *Moore v. Smith*, 14 Serg. & R. 393, per Duncan, C. J.

(r) *Child v. Grace*, 2 C. & P. 193, per Best, C. J.

(s) *Moore v. Smith*, 14 Serg. & R. 388.

(t) *Boyd v. Bolton*, 8 Ir. Eq. R. 113.

inquiries a regularity of proceeding is adopted, which prevents a person from interfering when and how he pleases, as he naturally would do in a common conversation (*t*). The same inference cannot, therefore, be drawn from his silence or his conduct on such occasions, as might reasonably result from similar behaviour, were he under no restraint; and as it is only for the sake of these inferences that the statements of other persons can ever be admitted, they are properly rejected, whenever they do not warrant the inferences sought to be drawn from them. A similar distinction has been recognised in the civil law, by which, "*confessio facta seu præsumpta ex taciturnitate in aliquo iudicio, non nocebit in alio*" (*u*).

§ 580. If, however, the statement of one person calls forth a reply from another, such statement may then be read in conjunction with the reply, and will become evidence against the party replying, so far as the answer directly or indirectly admits its truth; and it will make no difference in the application of this rule, whether the words were spoken by an interested party or a stranger; whether they were addressed or not to the party replying; or whether they fell from the parties, the witnesses, or the Court, in a judicial proceeding, or were uttered during the course of an ordinary conversation (*v*).

§ 581. But the *silence* of the party, even where the declarations are addressed to himself, at a time too when he is at full liberty to reply as he thinks fit, is, at best, worth very little as evidence of acquiescence (*w*); and if he has no means of knowing the truth or falsehood of the statement, the fact that he did not in terms deny it is almost valueless (*x*). In all these cases, too, it must be distinctly remembered, that it is not the statement made in the

(*t*) *Melen v. Andrews*, M. & M. 336, per Parke, J.; *Short v. Stoy*, cited in *Roscoe Ev.* 38, as ruled by Alderson, B.; *R. v. Appleby*, 3 Stark. R. 33, per Holroyd, J.; *R. v. Turner*, 1 Moo. C. C. 347, 348, per Patteson, J.; *Child v. Grace*, 2 C. & P. 193.

(*u*) *Mascardus*, de Prob. vol. i. concl. 348, n. 31.

(*v*) *Child v. Grace*, 2 C. & P. 193; *Jones v. Morrell*, 1 C. & Kir. 266, per Lord Denman; *R. v. Edmunds*, 6 C. & P. 164, per Tindal, C. J.; *Boyd v. Bolton*, 8 fr. Eq. R. 113.

(*w*) See 26th Chapter of St Matthew, v. 59—63; and 27th Chapter, v. 12—14.

(*x*) *Hayslep v. Gymer*, 1 A. & E. 165, per Parke, J. See further, on the subject of tacit admissions, *The State v. Rawls*, 2 Nott & M'Cord, 301; *Batturs v. Sellers*, 5 Har. & J. 117, 119.

party's presence which is evidence against him, but it is his own conduct and demeanour in consequence of such statement which is the evidence, and the sole evidence. Magistrates often make a mistake on this subject; but it is highly important that the distinction should be observed (*x*).

§ 582. We are next to consider the *effect* of admissions, when proved; and with regard to their *conclusiveness*, it is first to be observed, that the genius and policy of the law favour the investigation of truth by all expedient methods; and that the doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded (*y*). It is also to be observed, that estoppels bind only parties and privies; and not strangers. Hence it follows, that, though a stranger may often rely on an admission, which parties or privies might have specially pleaded by way of estoppel, yet, in his case, it is only matter of evidence, to be considered by the jury. This subject was very clearly illustrated by Mr. Justice Bayley, in delivering the judgment of the Court, in *Heane v. Rogers* (*z*), which was an action of trover, brought by a person against whom a commission of bankruptcy had issued, against his assignees, to recover the value of goods which, as assignees, they had sold. The defendants contended that the plaintiff was estopped from bringing this action, as, in addition to other evidence of his acquiescence in their title, it appeared that after the issuing of the commission, he had given notice to the lessors of a farm which he held, that he had become bankrupt, and was willing to give up the lease, whereupon the lessors accepted the lease, and took possession of the premises. The question, therefore, was, whether he was precluded by this surrender, from disputing the commission in the present suit. On this point the language of the learned Judge was as follows:—
“There is no doubt but that the express admissions of a party to

(*x*) Per Alderson, B., at Maidstone Sp. Ass. 1842, MS.; *Doe v. Frankis*, 11 A. & E. 793, per Lord Denman.

(*y*) See ante, § 72.

(*z*) 9 B. & C. 577, 586, 587. See also *Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Jennings v. Whittaker*, 4 Monroe, 50.

the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound. It is a well established rule of law, that estoppels bind parties and privies, not strangers (a). The offer of surrender made in this case was to a *stranger to this suit*; and though the bankrupt may have been bound by his representation that he was a bankrupt, and his acting as such, as between him and that stranger to whom that representation was made, and who acted upon it, he is not bound as between him and the defendant, who did not act on the faith of that representation at all. The bankrupt would probably not have been permitted, as against his landlords,—whom he had induced to accept the lease without a formal surrender in writing, and to take possession, upon the supposition that he was a bankrupt, and entitled under 6 Geo. 4, c. 16, § 75, to give it up,—to say afterwards that he was not a bankrupt, and bring an action of trover for the lease, or an ejectment for the estate. To that extent he would have been bound, probably no further, and certainly not as to any other persons than those landlords. This appears to us to be the rule of law, and we are of opinion that the bankrupt was not by law, by his notice and offer to surrender, estopped; and indeed it would be a great hardship if he were precluded by such an act. It is admitted that his surrender to his commissioners is no estoppel, because it would be very perilous to a bankrupt to dispute it, and try its validity by refusing to do so (b). A similar observation, though not to the same extent, applies to this act; for whilst his commission disables him from carrying on his business, and deprives him, for the present, of the means of occupying his farm with advantage, it would be a great loss to the bankrupt to continue to do so; paying a rent and remaining liable to the covenants of the lease, and deriving no adequate benefit; and it cannot be

(a) Co. Lit. 352 a; Com. Dig. Estop. C.

(b) See *Flower v. Herbert*, 2 Ves. Sen. 326.

expected that he should incur such a loss, in order to be enabled to dispute his commission with effect. It is reasonable that he should do the best for himself in the unfortunate situation in which he is placed."

§ 583. We have already, in a former part of this work, treated of estoppels by deed, alluded to those by record, and discussed that particular class of estoppels in pais, which relates to the rights of landlord and tenant (*c*); and in the preceding pages of the present chapter, we have shown that admissions solemnly made in the course of judicial proceedings, whether as a substitute for regular proof, or in a case stated for the opinion of the Court, are, on motives of policy and justice, deemed to be conclusive (*d*). It remains, then, only to examine the law as it regards other *conclusive admissions*; and these will, in general, be found to range themselves under one or other of the following heads. First, admissions expressly or tacitly made by *pleadings*; secondly, admissions which have been *acted upon* by others. To these may be added a few cases of fraud and illegality, and some admissions on oath, where the party is estopped on grounds of public policy.

§ 584. With respect to *admissions by pleading*, a party may, as it seems, by bringing an action on a contract, estop himself from denying the obligatory force of the agreement in a subsequent action against himself. For instance, if a corporation enter into an executory contract, which is invalid against themselves for not being under a common seal, and then sue thereon, there is little doubt but that this will amount to an admission on record, that such contract was duly entered into on their part, so as to be obligatory on them; and that such admission on the record would estop them in a cross action, from setting up an objection that it was not sealed by their common seal (*e*). However this may be, it is clear, that an admission made in one suit, by pleading or omitting to

(*c*) Ante, §§ 72—84.

(*d*) Ante, §§ 547, 555.

(*e*) Fishmongers' Co. v. Robertson, 5 M. & Gr. 192, 193, per Tindal, C. J.

plead, will conclusively bind the party, should a subsequent action be brought for the *same cause*. Thus, if an executor or administrator confesses judgment, or suffers it to go against him by default, he thereby admits assets in his hands, and is estopped to say the contrary in an action on such judgment, suggesting a *devastavit* (*f*). It is true there must be *some* proof that the assets have been wasted, in order to charge the executor or administrator personally in such a case; but the slightest evidence will be sufficient for this purpose; and the mere issuing of a writ of *fiat facias*, directed to the county where the action was laid, and a return of *nulla bona* thereto, has, for a long time past, been deemed evidence enough (*g*). So, where, to an action against three executors, two had pleaded *plene administraverunt*, and the third had admitted assets to the amount of 383*l.*, the Court held, that, in a subsequent action against the third executor suggesting a *devastavit*, the plaintiff was entitled to recover, on proof that the 383*l.* had been deposited with bankers to the credit of the executorship account, and that the defendant, after judgment in the former action, had given the plaintiff a cheque for the amount, which was dishonoured, as not being signed by the co-executors (*h*).

§ 585. An admission, however, *incidentally* or *tacitly* made in pleading in one suit, will not estop the party making it from denying the fact so admitted in another, where *precisely the same matter is not litigated*. For instance, where a plea to an action on a bond set out a corrupt agreement between the parties irrespective of the bond, and then went on to aver that the bond was given to secure, among other monies, the sum mentioned in the *said* agreement; and the replication tacitly admitting the corrupt agreement, traversed the fact of the bond having been given in consideration thereof, but the plaintiff failed on this issue; it was held, that the admission was available for the purpose of that suit only; and, consequently, the plaintiff was at liberty to dispute the corrupt nature of the agreement, in a subsequent action on a deed,

(*f*) *Skelton v. Hawling*, 1 Wils. 258.

(*g*) *Leonard v. Simpson*, 2 Bing. N. C. 176, 180, per Tindal, C. J.; 2 Scott, 335, S. C.

(*h*) *Cooper v. Taylor*, 6 M. & Gr. 989.

which was signed by the defendant at the same time with the bond by way of collateral security (i).

§ 586. The questions which usually arise on this subject relate to the effect which admissions in pleading have in the *same suit*; and here it may be laid down as a general rule, that, *whenever a material averment well pleaded is passed over by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading, if not for the purpose of trial before the jury, conclusively admitted (k)*. The proper understanding of this rule is the province of the special pleader; and it is in works on pleading that a detailed explanation of its effects should be sought. We may, however, here refer to a few leading decisions whereby its general operation is defined: and *first*, it is only with respect to *material* allegations that the rule operates; and therefore a demurrer admits no more than is well pleaded (l); and, if a plea denies a particular fact alleged in the declaration, it does not thereby admit all the immaterial statements which the pleader has chosen to introduce as part of the plaintiff's case (m). Thus, where a declaration in *assumpsit*,—after stating that the defendants were *owners* of a vessel, on which the plaintiff caused to be shipped some potatoes to be carried by them, as *owners* of the vessel, to Liverpool; in consideration whereof, and of freight, they promised to carry the potatoes safely *as aforesaid*,—alleged as a breach, that through their negligence they were damaged; it was held that the plea of *non-assumpsit* did not admit that the defendants were owners, so as to raise the inference that the captain was their agent, the allegation of ownership being regarded as wholly immaterial. The declaration in this case would have been equally good had there been no such allegation; since the statement, that,

(i) *Carter v. James*, 13 M. & W. 137. See *Rigge v. Burbidge*, 15 M. & W. 598; 4 Dowl. & L. 1, S. C.

(k) Com. Dig. Pleader, G. 2; Stephens on Plead. 248; *Jones v. Brown*, 1 Bing. N. C. 484; *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Stephen v. Pell*, 2 Dowl. 629; *Green v. Hearne*, 3 T. R. 301.

(l) *Van Sandau v. Turner*, 6 Q. B. 785, per Lord Denman.

(m) *Bennion v. Davison*, 3 M. & W. 179; *Dunford v. Trattles*, 12 M. & W. 534, per Parke, B. *Kuiz v. Harman* 11 Jan. C.P. 924. 925

in consideration of the plaintiff having shipped the goods, and of the freight, the defendants promised to carry them safely, would have been quite sufficient, when coupled with an allegation that the goods were not safely carried, to have made a complete case of liability against the defendants (*n*).

§ 587. *Secondly*, there appears to be some difference of opinion among the judges as to how far *admissions on the record* may have the effect of *shifting the burthen of proof*. The Court of Exchequer, and especially Mr. Baron Alderson, contend, that "an admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but if *any inferences are to be drawn by the jury*, they must have the facts from which such inferences are to be drawn proved like any other facts" (*o*). This view of the law seems to rest partly on the ground that the *pleadings* are not before the jury, but only the issue (*p*); partly on a consideration of the old doctrine of protestation, coupled with the rule of court, which provides that though this formula shall no longer be used in any pleadings, "either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made" (*q*); partly, on a somewhat forced argument, that if an admission on the record is to be taken as an admission for all purposes, it may be used for the purpose even of discrediting the witnesses (*r*); but chiefly on the injustice of preventing a party,

(*n*) *Bennion v. Davison*, 3 M. & W. 179, 182, 183, per Parke, B.; recognised by Alderson, B., in *Dunford v. Trattles*, 12 M. & W. 532.

(*o*) *Edmunds v. Groves*, 2 M. & W. 642, 645, per Alderson, B. In this case Lord Abinger refrained from expressing any opinion on the subject, *id.* 644. See also *Bennion v. Davison*, 3 M. & W. 183, per Alderson, B.

(*p*) *Edmunds v. Groves*, 2 M. & W. 643, per Alderson, B. In *Fearn v. Filica*, 7 M. & Gr. 517, Cresswell, J., observed, with reference to this doctrine, "I take it that what my brother Alderson meant was, that the fact put in issue was to be proved just as if no admission were made on the record; that is, that an admission in the record is not to be taken to prove the issue;" and his Lordship added, "If the rule is not as stated by Alderson, B., this singular state of circumstances might arise,—a counsel might ask the jury from the mere state of the record, to infer a fact which was directly in issue," *id.* 518.

(*q*) Reg. Gen. H. T. 4 Will. 4, r. 12; 5 B. & Ad. v; *Bennion v. Davison*, 3 M. & W. 181, per Alderson, B.

(*r*) *Carter v. James*, 13 M. & W. 145, per Alderson, B.

by the rules of pleading, from denying a particular fact, and yet calling upon the jury to treat that fact as proved. "If this be the law," said Mr. Baron Alderson, "then a double replication is of the very essence of justice" (s). On the other hand, the Court of Queen's Bench hold, that "an admission made in the course of pleading, whether in express terms, or by omitting to traverse what has been before alleged, must be taken as an admission for all purposes regarding the issue arising from that pleading, whether the facts relate to the parties or to third persons, provided the allegation so admitted be material" (t).

§ 588. If we may venture to give an opinion on the respective merits of these conflicting decisions, it will be in favour of that pronounced by Mr. Baron Alderson; for although the injustice alluded to by his Lordship cannot affect a defendant, who may traverse in separate pleas every material averment contained in the declaration, it certainly may press hard upon a plaintiff, to whom the replication *de injuriâ* affords only a partial protection. The distinction between admissions for the purpose of pleading, and admissions for the purpose of trial, may be somewhat subtle (u); but perhaps it may be found capable of explanation, and if so, it may prove of practical value. Surely there is no inconsistency in saying, "I will not put you to prove a certain fact of which I know nothing, and on the non-existence of which I consequently do not intend to rely; but mind, I do not intend that the jury should treat that fact as absolutely proved, so as to presume therefrom another fact, the non-existence of which is the main point in my case."

§ 589. However the learned judges may differ respecting the point now under discussion, the cases in which that difference was expressed, would seem to be respectively well decided, and to be reconcilable with each other. In *Edmunds v. Groves* (v), and

(s) *Smith v. Martin*, 9 M. & W. 308, per Alderson, B.

(t) *Bingham v. Stanley*, 2 Q. B. 127; explained and somewhat varied in *Robins v. Lord Maidstone*, 4 Q. B. 816.

(u) In *Bingham v. Stanley*, 2 Q. B. 121, Patteson, J., owned that he could not understand it. See ante, § 587, n. (p).

(v) 2 M. & W. 642.

again in *Smith v. Martin* (*w*), the declaration was by the indorsee against the maker of a note; the plea stated that the note was illegal in its inception, and that the plaintiff took it with knowledge of the illegality; the replication traversed the fact of knowledge: on these pleadings the Court of Exchequer held, that, inasmuch as the declaration contained no averment negating knowledge of the illegality, but this was introduced for the first time in the plea, the defendant was bound to prove the plaintiff's knowledge (*x*); and indeed, the same decision would have been pronounced, had the Court considered that the illegality alleged in the plea was by the replication conclusively admitted for all purposes, because the admission, or even the proof, of illegality could afford no presumption on the subject of knowledge (*y*). Again, in *Bingham v. Stanley* (*z*), the plea to a similar declaration averred, that the note was given for a gaming debt, and then went on to state, not that the plaintiff took it with knowledge, but that he held it without consideration; and the Court of Queen's Bench rightly determined, on a replication alleging that the note was indorsed for a good consideration, that the plaintiff was bound to prove that fact, in like manner as he would have been, had he replied *de injuriâ*, and the defendant had proved the illegality (*a*). Here, the declaration contained an original averment of indorsement, which was an ambiguous phrase, and might mean, either an indorsement in fact, by writing the name on the note, or an indorsement for a valuable consideration. The defendant, by alleging illegality, had shown that the latter sense was the one which he intended to dispute, and the plaintiff, by averring in his replication that the note was indorsed for a valuable consideration, merely explained the original averment of indorsement contained in the declaration, and was consequently bound to prove an affirmative statement, which he had first made (*b*). This explanation may, perhaps, be thought somewhat unsatisfactory; but it is the best that can be offered.

(*w*) 9 M. & W. 304.

(*x*) Per Alderson, B., in *Carter v. James*, 13 M. & W. 144, 145.

(*y*) *Smith v. Martin*, 9 M. & W. 307, per Alderson, B., and Lord Abinger.

(*z*) 2 Q.B. 117; 1 G. & D. 237, S. C. (*a*) *Bailey v. Bidwell*, 13 M. & W. 73.

(*b*) Per Alderson, B., in *Carter v. James*, 13 M. & W. 144, 145; and per *id.* in *Bailey v. Bidwell*, *id.* 77.

§ 590. *Thirdly*, the tacit admission of a material fact by pleading over and traversing some other material allegation, cannot operate in the cause to the prejudice of the party making it, if he *succeeds* on the issue raised by his traverse. This point was established in the case of *Robins v. Lord Maidstone* (c). There, to a declaration on a promissory note, the defendant pleaded that the consideration was a sum less than the amount of the note, and that that sum had been paid. The replication traversed the payment, and the verdict was for the plaintiff. The question then arose, whether the plaintiff was entitled to the whole amount of the note, or to the sum alleged in the plea, and tacitly admitted by the replication to have been the sole consideration. The Court, in holding that the verdict must be entered for the entire amount, observed, that “ if the *defendant* had proved the payment which he alleged, it would not have been competent to the plaintiff to prove that more had been advanced : if he wished to have done so, he ought to have traversed the allegation that no more had been advanced, and, perhaps, shown how much more. But where a plea consists of several material allegations, one of which is traversed and found for the *plaintiff*, *there is an end of the plea altogether*; and the *defendant can take no advantage of that part which was not traversed*. The defendant sustains no injury ; for he has pleaded that which is false, viz., the payment. If in truth 200*l.* only was advanced, he should have so pleaded, adding a payment into court of the amount due ; and then the plaintiff would have been obliged, either to take the sum paid in, with costs, in discharge of the action, or to have replied that more was due, at the peril of having a verdict against him if he failed to prove it ” (d).

§ 591. *Fourthly*, the omitting to traverse a material allegation so far admits it, that the *party who thus pleads over cannot disprove it*. Therefore, where, in trover for bales of silk, the defendant pleaded that A. was factor of the plaintiffs, and as such, before and *at the time* of the pledge mentioned in the plea, *was entrusted by them with, and was in possession of*, dock-warrants relating to the bales ; that he delivered the dock-warrants to the defendant, and pledged with

(c) 4 Q. B. 811.

(d) Id. 816.

him the bales, as security for a loan which the defendant then advanced to him on the faith of the said dock-warrants; and that the defendant had no notice that the factor was not the actual owner; it was held that the plaintiffs, by simply traversing the allegation that the defendant advanced the money on the faith of the dock-warrants, were debarred from proving that the dock-warrants were not deposited at the time of the advance, and were not, in fact, then in existence (e). The same point was ruled in *Carter v. James*, which has been already noticed on another point (f). That case was an action on a bond, to which the defendant pleaded that an usurious agreement had been entered into between the plaintiff and himself, and that the bond had been given in consideration, among other things, of the said agreement. The replication traversed this last fact only, and the Courts of Queen's Bench and Exchequer both held, that, on these pleadings, the plaintiff was not at liberty to prove that the agreement was in reality not usurious, that fact not having been put in issue (g). So, where, to an action of trespass *quare clausum fregit*, the defendant pleaded that A., being seised in fee, granted a right of way by a lost deed, and the plaintiff replied that A. did not grant *modo et formâ*; the latter was not allowed to show that A. was not seised in fee, for the purpose of rebutting the presumption of the grant (h). The case of *Ridley v. Tindall* (i) is not inconsistent with these authorities. There the defendant pleaded to an action of *assumpsit*, that he had paid, and the plaintiff had accepted, certain monies in full satisfaction; and though the plaintiff merely traversed the acceptance in satisfaction, he was permitted to dispute the payment. The ruling was clearly correct; for as, unless the money were *accepted*, it could not be a *payment*, but a *tender* only, the payment in satisfaction, and the acceptance in satisfaction, were one and the same act, and, as such, a traverse of the one was a traverse of both (k).

§ 592. *Fifthly*, though a count or plea in one action may, in

(e) *Bonzi v. Stewart*, 4 M. & Gr. 295.

(f) *Ante*, § 585.

(g) *Carter v. James*, 13 M. & W. 145, 146, text and note.

(h) *Cowlishaw v. Cheslyn*, 1 Cr. & Jer. 48.

(i) 7 A. & E. 134.

(k) *Per Tindal, C. J.*, in *Bonzi v. Stewart*, 4 M. & Gr. 329, 330.

certain cases, be used as a conclusive admission in another, it *can never be used by the opponent as evidence to establish his case on another issue on the same record (l)*. For instance, if not guilty and a justification be pleaded to a declaration in trespass, the admission of the trespass in the justification will not entitle the plaintiff to a verdict on the plea of not guilty; because, whatever issues are joined upon any counts or pleas are to be tried by the jury distinctly from each other (*m*). So strict is this rule, that a special plea, held bad on demurrer, cannot be read by the plaintiff at the trial of the general issue, as a direct admission by the defendant of the statements therein contained, though the jury be summoned to assess the damages on the demurrer, as well as to try the cause on the general issue (*n*); neither can the defendant, under similar circumstances, advert to the plea, and use the demurrer as an indirect admission by the plaintiff of the facts stated in such plea (*o*). So, where a declaration contained two inconsistent counts, on the second of which the defendant paid money into court, which the plaintiff accepted, it was held that such count, and the proceedings thereon, could not be read to the jury by the defendant as evidence to negative an allegation in the first count (*p*). It was contended, in that case, that taking the money out of court in satisfaction of the matter in the second count, was an *act* of the plaintiff apparent on the record, of which the defendant was entitled to avail himself. But the answer given by the Court was, that this part of the pleading was not before the jury (*q*).

§ 593. There appears to be *one exception* to this rule, where a verdict has been found on an immaterial issue, and the Court is

(*l*) *Knight v. M'Douall*, 12 A. & E. 438, 442, per Patteson, J. As to when it may be used in aggravation or mitigation of damages, see ante, § 254. See also *Hyde v. Watts*, 12 M. & W. 254, as to when the defects in one pleading may be cured by admissions contained in the pleadings of the adverse party.

(*m*) *Gould v. Oliver*, 2 M. & Gr. 234, per Tindal, C. J.; *Harington v. Macmorris*, 5 Taunt. 228; 1 Marsh. 33, S. C.

(*n*) *Firmin v. Crucifix*, 5 C. & P. 98, per Lord Lyndhurst; *Montgomery v. Richardson*, id. 247, per Lord Tenterden.

(*o*) *Ingram v. Lawson*, 2 M. & Rob. 253, per Maule, J.

(*p*) *Gould v. Oliver*, 2 M. & Gr. 208; 2 Scott, N. R. 241, S. C.

(*q*) *Id.*, 2 M. & Gr. 234.

subsequently called upon by the one side to enter up judgment non obstante veredicto, and by the other to grant a repleader. Here, the Court will examine the whole record; and if it appear thereby that the defendant, besides raising the immaterial issue on which the question arises, has pleaded other material matters which have been disposed of on proper issues, and found for the plaintiff, it will award to the plaintiff judgment non obstante veredicto, the reasons for a repleader ceasing (*r*). Neither will the effect of this exception be neutralised, even though the good pleas do not severally or collectively confess or traverse *all* the material facts alleged in the declaration; for as a repleader is never granted except where complete justice cannot be answered without it, the Court will not interfere in this manner on behalf of the defendant, where he has already, by raising one or more correct issues, each of which would decide the action, enjoyed all the advantages which either justice or reason demands (*s*). If, indeed, the plea or replication, traversing an immaterial allegation, stands alone on the record (*t*); or if, as was the case in *Gwynne v. Burnell*, a good plea has been pleaded in conjunction with others, but in consequence of the rejoinder departing therefrom, and raising an immaterial issue, the matter involved in such plea has never been tried at all; in either of such cases a repleader will still be awarded (*u*); unless, perhaps, where the immaterial issue is found against the party who made the first fault in pleading (*x*).

§ 594. *Sixthly*, in conformity with the rule that an admission in one plea cannot be prayed in aid of another, because the jury must separately determine the merits of each issue, a *new assignment*

(*r*) *Negelen v. Mitchell*, 7 M. & W. 612, 622; 1 Dowl. N. S. 110, S. C.; overruling *Plummer v. Lee*, 2 M. & W. 495, as to this point. See also *Goodburne v. Bowman*, 9 Bing. 532, 542, 543; 2 M. & Scott, 700, 713, S. C.

(*s*) *Gwynne v. Burnell*, 6 Bing. N. C. 532, 533, per Parke, B.; *Goodburne v. Bowman*, 9 Bing. 542, 543, per Tindal, C. J.; compare also the comments of other judges on *Goodburne v. Bowman*, as reported in *Gwynne v. Burnell*, 6 Bing. N. C. 472, 509, 518, 520, 481.

(*t*) *Plummer v. Lee*, 2 M. & W. 495; *Negelen v. Mitchell*, 7 M. & W. 622; *Gordon v. Ellis*, 2 Dowl. & L. 308, 318.

(*u*) 6 Bing. N. C. 532—534, per Parke, B.; 567, 568, per Lord Brougham.

(*x*) *Kempe v. Crews*, 1 Lord Raym. 167, explained in *Gordon v. Ellis*, 2 Dowl. & L. 318, 319, per Tindal, C. J.

does not admit the truth of those matters stated in the plea which it does not pretend to traverse; for, although a distinction for some purposes may very properly be drawn between collateral and continuous pleading, and it may perhaps be contended with truth that a new assignment, to a certain extent, falls within the latter class, yet it is obvious that the plaintiff, by adopting this course of pleading, intends to waive all inquiry respecting the facts stated in the plea, as not applying to the true cause of action. The effect, therefore, of a new assignment is not strictly to admit the truth of these facts, but to withdraw them entirely from consideration, as forming any part of the subject-matter of the action, and thus, on the one hand, to prevent the plaintiff from complaining of them, and, on the other, to preclude the defendant from relying on them in support of the issue raised on the new assignment. They are, in point of fact, to be regarded as if they were struck out of the record, and the true grounds of complaint are to be sought in the explanation of the declaration which the new assignment contains (y). For some purposes, indeed, the matters stated in the plea, and not disputed by the new assignment, will be noticed by the Court; as, for instance, if to an action for assault the defendant justifies, and the plaintiff new assigns another assault on a different occasion, the latter must either prove both assaults, or at least show that the one of which he complains in his new assignment is substantially different from that alleged in the plea; and so, if in an action of trespass *quare clausum fregit* a justification is pleaded under a right of way, and a trespass *extra viam* is new assigned, the plaintiff must prove at the trial that such last-named trespass was in fact committed; but in both these cases the proof is required, not so much on account of any admission assumed to have been made by the plaintiff, as because it directly establishes the issue which has been raised by the new assignment (z).

(y) *Norman v. Wescombe*, 2 M. & W. 349, 360, 361; *Dand v. Kingscote*, 6 M. & W. 197, per Parke, B.; *Brancker v. Molyneux*, 1 M. & Gr. 710; 1 Scott, N. R. 553, S. C.; *Stephens* on Pl. 261.

(z) *Darby v. Smith*, 2 M. & Rob. 184, per Lord Abinger; *Oakley v. Davis*, 16 East, 86, per Lord Ellenborough. See *Bolton v. Sherman*, 2 M. & W. 399, per Parke, B.; *Alston v. Mills*, 9 A. & E. 248; 1 P. & D. 197, S. C. *Robinson v. Gaultlett*
16 M. & W. 389

nullity (*l*). There are many other statutes which authorise plea of payment of money into court, when actions are brought against persons for acts done by them in pursuance or under the authority of acts of Parliament (*m*).

§ 598. The salutary effect of these regulations has been much impaired, first, by not extending them to all personal actions whatever, with the single exception of the action for adultery, on which the plaintiff intends to found a subsequent application to Parliament for a divorce; secondly, by subjecting the defendant to the needless expense of obtaining counsel's signature to the plea, and, in many cases, of applying either to the Court on motion, or to a judge by summons, for leave to do that which he should always be permitted to do of his own accord; but chiefly, and this is the reason why the subject is here noticed, by allowing *payment of money into court* to be regarded as an *admission of the cause of action*. It is very true that recent decisions have, to a certain extent, remedied this last evil, and that now, where money is paid into court *upon the general indebitatus counts*, the payment amounts only to an admission that the defendant is liable, in respect of some one or more contracts or causes of action stated in the general counts, to the *extent of the sum so paid in*; and the plaintiff cannot apply that admission to any particular contract he may please to select, any more than the defendant (*n*). If, therefore, the plaintiff seeks to recover any damages or debt beyond the sum paid into court, he must prove not only that a larger sum was due, but also the existence of the contract on which he relies (*o*), as well

(*l*) 6 & 7 Vict., c. 96, § 2, and 8 & 9 Vict., c. 75, § 2, as to England; and 8 & 9 Vict., c. 75, §§ 1 and 2, as to Ireland.

(*m*) See ante, §§ 233—236.

(*n*) *Archer v. English*, 1 M. & Gr. 876, per Tindal, C. J.; *Kingham v. Robins*, 5 M. & W. 94, 102, per Alderson, B.; *Stapleton v. Nowell*, 6 M. & W. 9, 11, per id.; *Seaton v. Benedict*, 5 Bing. 28; *Steavenson v. Corporation of Berwick*, 1 Q. B. 154; 4 P. & D. 546, S. C.; *Elgar v. Watson, C. & Marsh*, 494.

(*o*) *Archer v. English*, 1 M. & Gr. 876, per Tindal, C. J.; *Kingham v. Robins*, 5 M. & W. 99—101, per Parke, B., overruling dicta thrown out by himself and Littledale, J., in *Meager v. Smith*, 4 B. & Ad. 673; 1 N. & M. 449, S. C. See also *Goff v. Harris*, 5 M. & Gr. 577, per Erskine, J.

as his separate right to sue on that contract (*p*); and if the action be brought against two or more defendants, he must further show their joint liability (*q*). Neither can he avail himself of his bill of particulars, in order to see on what ground the payment was made, because the declaration must exist independently of the particulars, and must be taken to have some meaning as well before particulars are delivered as afterwards (*r*). Much less can the joint payment of money into court by two defendants under the indebitatus counts be treated as an acknowledgment of their partnership, as alleged in a special count (*s*).

§ 599. If, however, the plaintiff declares upon a *special* contract, and the defendant meets the special count by paying money into court, such payment will still be regarded as a conclusive acknowledgment of the contract set forth in the declaration (*t*). The technical reasons on which this rule rests are, first, that the payment admits that something is due, and therefore must admit that the contract was made, by which alone anything is due from the defendant to the plaintiff (*u*); and, secondly, that the plea of payment of money into court is a plea in bar of the *further* maintenance of the action, and consequently amounts to an admission that the action was well commenced (*x*). The defendant, therefore, who has so pleaded, cannot object to the jurisdiction of the Court (*y*), or set up the non-performance by the plaintiff of a

(*p*) *Kingham v. Robins*, 5 M. & W. 100, per Parke, B.; 7 Dowl. 352, S. C.; overruling *Walker v. Rawson*, 1 M. & Rob. 250, per Tindal, C. J.

(*q*) *Archer v. English*, 1 M. & Gr. 873; 2 Scott, N. R. 156, S. C., and also 9 Dowl. 21, S. C., nom. *Archer v. Walker*; *Stapleton v. Nowell*, 6 M. & W. 9; 8 Dowl. 196, S. C., overruling *Ravenscroft v. Wise*, 1 C. M. & R. 203; 2 Dowl. 676; 4 Tyr. 741, S. C.

(*r*) *Kingham v. Robins*, 5 M. & W. 100, per Parke, B., explaining and confirming *Meager v. Smith*, 4 B. & Ad. 673; 1 N. & M. 449, S. C. See also *Russell v. Bell*, 10 M. & W. 349, per Lord Abinger, 352, 353, per Alderson, B.; *Goff v. Harris*, 5 M. & Gr. 573.

(*s*) *Charles v. Branker*, 12 M. & W. 743, confirming *Kingham v. Robins* and *Stapleton v. Nowell*.

(*t*) *Kingham v. Robins*, 5 M. & W. 99, per Parke, B.; *Archer v. English*, 1 M. & Gr. 876, 878.

(*u*) *Stapleton v. Nowell*, 6 M. & W. 11, per Alderson, B. *is to the effect of paying money into court, and the Court of the Division is on a Bill of Particulars.*

(*x*) *Thompson v. Jackson*, 1 M. & Gr. 244, per Tindal, C. J. *See also per 657*

(*y*) *Miller v. Williams*, 5 Esp. 22, per Lord Ellenborough.

condition precedent (*x*), or urge that the action has been brought too soon (*a*), or deny the plaintiff's claim to the character in which he sues (*b*), or move to arrest the judgment on account of the insufficiency of the declaration (*c*), or contend that the agreement is not in writing, and signed in accordance with the Statute of Frauds (*d*), or rely on the insufficiency of the stamp (*e*), or insist on the plaintiff producing the attesting witness (*f*), or plead other pleas denying the existence of the same cause of action (*g*), unless he be permitted to do so by some particular statute, or give evidence, in mitigation of damages, of facts which would bar the plaintiff's recovery; as, for instance, if the action be brought for discharging the plaintiff from service, the defendant, who has paid money into court, cannot, in mitigation of damages, justify the discharge on the ground of the plaintiff's misconduct (*h*).

§ 600. In applying the above rule to particular cases, strict attention must be paid to the two following points. First, payment of money into court admits the special contract set out in the declaration, *only to that extent to which the plaintiff is bound to prove it*; for it would be obviously unjust if the admission were to tie the defendant when the plaintiff would be loose. For instance, in *Cooper v. Blick* (*i*), the plaintiff declared upon a contract by the defendants to employ him, to wit, in the capacity of editor of a newspaper, at a certain salary, to wit, at the rate of 400*l.* per annum. The defendants paid money into court, and by so doing were held to have admitted the capacity in which the plaintiff had engaged to serve them, but not the amount of salary which they had agreed to pay him. Both averments were laid under *videlicet*;

(*z*) *Harrison v. Douglas*, 3 A. & E. 396, 402.

(*a*) *Id.* 403.

(*b*) *Lipscombe v. Holmes*, 2 Camp. 442, per Lord Ellenborough.

(*c*) *Wright v. Goddard*, 8 A. & E. 144, 148, 150.

(*d*) *Middleton v. Brewer*, Pea. R. 15, per Lord Kenyon.

(*e*) *Israel v. Benjamin*, 3 Camp. 40, per Lord Ellenborough, *confirmed afterwards* by the full court.

(*f*) *Randall v. Lynch*, 2 Camp. 357, per Lord Ellenborough.

(*g*) *Thompson v. Jackson*, 1 M. & Gr. 242.

(*h*) *Speck v. Phillips*, 5 M. & W. 279; 7 Dowl. 470, S. C.

(*i*) 2 Q. B. 915.

but the court applying the true test, namely, what must the plaintiff have proved, had non assumpsit been pleaded, decided that the former averment was material, and the latter immaterial. In discussing the effect of the *videlicet*, Mr. Justice Patteson observed, that it could not make that immaterial, which was in its nature material, though its omission might render that material, which would otherwise not be so; and he illustrated these propositions by pointing out, that a *videlicet* could not make the sum in a bill of exchange immaterial, because that was matter of description, but its omission in the declaration before him would have bound the plaintiff to the precise rate of salary stated, and the admission of the defendants by payment into court would then have bound them in the same manner (i).

§ 601. The other point deserving attention is perhaps only another mode of stating the proposition just adverted to. It is this:—that though payment into court admits the entire contract declared on, as also the specific breach in respect of which the payment is made, it does not admit any damages on that breach beyond the sum paid in, still less does it admit any other breach to which the payment does not apply. Thus, payment of money into court upon a count on a valued policy of insurance, which states a total loss by capture, admits the contract and the capture, but not the total loss, and the plaintiff therefore must still prove that he has suffered damage from the capture beyond the sum paid (k). So where the declaration, after stating that the defendant and another were indebted to the plaintiff in a certain sum, to wit 250*l.*, but that the debt was barred by the Statute of Limitations, averred that defendant afterwards, and within six years from the commencement of the suit, signed a written promise to pay his proportion of the debt, which proportion amounted to a certain sum, to wit a moiety of the debt, and then assigned non-payment as a breach, it was held that the defendant, by paying 10*s.* into court, admitted the contract and breach, but disputed the amount

(i) 2 Q. B. 918, 924. See *Guardians of Banbury Union v. Robinson*, 4 Q. B. 919.

(k) *Rucker v. Palgrave*, 1 Camp. 557, per Sir James Mansfield; 1 Taunt. 419, S. C.; *Everth v. Bell*, 7 Taunt. 450.

due (*l*). Again, payment into court in an action upon a promissory note, payable by instalments, admits only that the sum paid was due upon the note, and does not preclude the defendant from pleading the Statute of Limitations as to any further sum (*m*); nor, in short, is the defendant, by so paying, debarred from taking any other objection, in order to limit the operation of the contract declared on, and to prevent the plaintiff from recovering more than the actual amount paid (*n*).

§ 602. The service of a summons to show cause, why the defendant should not be permitted to pay a certain amount into court, will be *some* evidence of liability to that extent, though unless it be followed up by a corresponding plea of payment, it will by no means be conclusive (*o*). The rules stated above, as governing the effect by way of admission of paying money into court, apply equally to the plea of *tender* (*p*), and it is therefore unnecessary to repeat them here with particular reference to that plea.

§ 603. How far a plea *in abatement* (*q*) admits the defendant's liability is not very distinctly ascertained, but the better opinion is, that when such plea is not supported by proof, the case remains the same as if the defendant had suffered judgment to go by default (*r*); that is, if the action be one wherein the judgment is *final*, it admits the debt, but if the judgment be *interlocutory*, it merely admits a liability to nominal damages. In this last class of cases, therefore, the plaintiff must still prove the amount of his demand (*s*); and if this arises from any contract which he has

(*l*) *Lechmere v. Fletcher*, 1 Cr. & Mee. 623, 627, per Bayley, J.; 3 Tyr. 450, S. C.

(*m*) *Reid v. Dickons*, 5 B. & Ad. 499; recognised by Patteson, J., in *Shearwood v. Hay*, 5 A. & E. 390.

(*n*) *Cox v. Parry*, 1 T. R. 464.

(*o*) *Lawson v. Mangles*, 2 M. & Rob. 427, per Parke, B.; *Williamson v. Henley*, 6 Bing. 305, per Tindal, C. J.

(*p*) *Edan v. Dudfield*, 1 Q. B. 304, per Lord Denman; *Cox v. Brain*, 3 Taunt. 95; *Middleton v. Brewer*, Pea. R. 15; *Bulwer v. Horne*, 1 N. & M. 117; *Jewell v. Wyatt*, 1 W. W. & H. 47; *Willis v. Langridge*, 2 Har. & W. 250.

(*q*) See 3 & 4 Will. 4, c. 42, §§ 8, 9, and 10.

(*r*) *Pasmore v. Bonusfield*, 1 Stark. R. 298, per Lord Ellenborough.

(*s*) *Weleker v. Le Pelletier*, 1 Camp. 481; *Morris v. Lotan*, 1 M. & Rob. 223.

made with a joint-stock company or other firm, he must also, in order to recover substantial damages, show by independent evidence that the defendant is a shareholder or co-partner therein; unless that fact is alleged in the declaration, and therefore stands admitted on the record (*t*); or unless the defendant himself, while endeavouring to support his plea, has treated the partnership as a matter not in dispute (*u*). It remains only to add, that when a defendant pleads generally the non-joinder of other parties as co-defendants, such plea is not divisible, but if it fails in part, it must fail altogether. Thus, where, on a plea of abatement to an action for work done, the plaintiff proved that work was done to the amount of 5*l.* for the defendant alone, and to the further amount of 6*l.* for the defendant jointly with the other persons mentioned in the plea, the Court held that the plaintiff was entitled to a verdict for the whole 11*l.*, and that in order to entitle the defendant to avail himself of his plea in abatement, he should have limited its application to the particular items for which he was jointly liable with others (*v*).

§ 604. When judicial admissions have been *made improvidently, and by mistake*, the court will, in its discretion, relieve the party from the consequences of his error, by ordering a repleader, or by permitting an amendment, or by discharging the case stated, or the rule, or the agreement, if made in court (*x*). Agreements, too, made out of court between attornies, concerning the course of proceedings in court, are, in effect, equally under the Court's control, by means of its coercive power over the attorney in all matters relating to professional character and conduct. But, in all these

(*t*) See per Pollock, C. B., and Rolfe, B., in *Crellin v. Calvert*, 14 M. & W. 18, 19, and per Rolfe, B., in *id.* 22.

(*u*) *Crellin v. Calvert*, 14 M. & W. 11. In that case, the Court was divided, as to whether the course pursued by the defendant at the trial amounted to a waiver of proof of his liability as a shareholder in a joint-stock bank. Pollock, C. B., and Platt, B., holding the affirmative, and Rolfe, B., the negative.

(*v*) *Hill v. White*, 6 Bing. N. C. 26, overruling *Colson v. Selby*, 1 Esp. 452.

(*x*) "Non fatetur, qui errat, nisi jus ignoravit." Dig. lib. 42, tit. 2, l. 2. "Si vero per errorem fuerit facta ipsa confessio, (scil. ab advocatione,) clienti concessum est, errore probato, usque ad sententiam revocare." Mascard. de probat. vol. 1, quæst. 7, n. 63; *id.* n. 19, 20, 21, 22; *id.* vol. 1, Concl. 348, per tot.

cases, the party will be held to his admission, unless it *clearly* appear that he has acted through mistake (y).

§ 605. Admissions, which have been *acted upon by others*, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance, whether they were made in express language to the person himself, or may be implied from the open and general conduct of the party; for, in the latter case, the implied declaration will be considered as having been addressed to every one in particular, who may have had occasion to act upon it; and the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (z). Indeed, the principle may be laid down still more broadly, as precluding any party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, from disputing that fact in an action against the person whom he has himself assisted in deceiving (a). In such case the party is estopped, on grounds of public policy and good faith, from repudiating his own representations (b).

§ 606. A similar doctrine is recognised by Courts of Equity in reference to negotiations which have been entered into preparatory to marriage, and the abstract rule deducible from the authorities on this subject is, that, whenever a representation has been made by one party for the purpose of influencing the conduct

(y) See *Pearse v. Grove*, 3 Atk. 523, per Lord Hardwicke; Amb. 65, S. C. The Roman law was administered in the same spirit. "Si is, cum quo Lege Aquilia agitur, confessus est servum occidisse, licet non occiderit, si tamen occisus sit homo, ex confesso tenetur." Dig. lib. 42, tit. 2, l. 4; id. l. 6. See also Van Leeuwen's Comm. B. V. ch. 21; Everhardi Concil. 155, n. 3. "Confessus pro judicato est." Dig. ub. supr. l. 1.

(z) Per Lord Denman, in *Pickard v. Sears*, 6 A. & E. 474.

(a) Per Lord Denman, in *Gregg v. Wells*, 10 A. & E. 98; recognised by Parke, B., in *Harrison v. Wright*, 13 M. & W. 820.

(b) See ante, § 72.

of another, and has been acted upon by the latter, this will, in general, be sufficient to entitle him to the assistance of a Court of Equity for the purpose of realising such representation (c).

§ 607. The rule, at common law, is familiarly illustrated by the case of a man cohabiting with a woman, and treating her in the face of the world as his wife, when in fact he is not married to her. Here, though he thereby acquires no rights against others, yet they may against him; and therefore, if the mistress be supplied with goods during such cohabitation, and the reputed husband be sued for them, he will not be permitted to disprove or deny the marriage (d). So, if the lands of such woman be taken in execution for her reputed husband's debt, as his own freehold in her right, he will be estopped, by the relation *de facto* of husband and wife, from saying that he held them as her servant (e). Neither will a woman, who has solemnly declared that she was married to a particular man, and whose goods, are thus admitted to belong to her husband in her right, be allowed, on his bankruptcy, to deny the marriage, and to lay claim to the goods as her sole property (f). But a woman really married is, from some strange caprice in the law, excluded from the operation of this rule; and, therefore, if an action be brought against her as a feme sole, she may discharge herself from all liability by pleading and proving that at the time of the contract she was a married woman, although the plaintiff can show beyond dispute, not only that she had held herself out to the world as a single woman, but that she had deliberately declared to himself that she was unmarried, and that he had supplied her with goods, and had sued her afterwards, on the faith of such statement (g).

(c) *Hammersley v. Baron de Biel*, 12 Cl. & Fin. 45, 62, n., per Lord Cottenham, 88, per Lord Campbell; *Hodgson v. Hutchenson*, 5 Vin. Abr. 522; *Cooker v. Marcall*, 2 Vern. 200; *Wankford v. Fotherley*, id. 322; *Luders v. Anstey*, 4 Ves. 501.

(d) *Watson v. Threlkeld*, 2 Esp. 637, per Lord Kenyon; *Robinson v. Nahon*, 1 Camp. 245, per Lord Ellenborough; *Munro v. De Chemant*, 4 Camp. 215, per id.

(e) *Divoll v. Leadbetter*, 4 Pick. 220.

(f) *Mace v. Cadell*, 1 Cowp. 233, per Lord Mansfield; recognised by Gaselee, J., in *Batthews v. Galindo*, 4 Bing. 613.

(g) *Glenister v. Lady E. Thynne*, Easter T. 1847, Q. B., per Coleridge, J., MS.

§ 608. So, also, where a person knowingly permits his name to be used as one of the partners in a trading firm, or an existing joint-stock company, under such circumstances of publicity as to satisfy a jury that a stranger knew of it, and believed him to be a partner, he is liable to such stranger in all transactions, in which the latter engaged and gave credit upon the faith of his being such partner (*k*). So, although the mere fact of a person agreeing to become a member of the *provisional committee* of an intended railway company, or even the fact of such person authorising his name to be published in a prospectus, which contains nothing more than the names of the provisional committee-men, will not render him liable for contracts made by the other members or by the solicitor, for the purpose of promoting the objects in view; because such an intended association does not amount to a partnership, as it constitutes no agreement to share in profit and loss (*l*);—still, if there be evidence that such person has *acted* with relation to the proposed scheme, as by attending meetings, giving directions, and the like, it will be for the jury to determine whether he has not thereby authorised the managing committee, or the other members of the provisional committee, or the solicitor or secretary of the intended company, to pledge his credit for the necessary and ordinary expenses to be incurred in forming the company; and if they decide this question in the affirmative, they may then give a verdict against him, if they further find that the work was done, and the credit given, on the faith of his being liable (*m*). On the same principle, if a man, by holding out false colours, induces a railway company to register him as a proprietor of shares, and, subsequently, to bring an action against him for calls on such shares, he will be precluded from disputing the

(*k*) Per Parke, J., in *Dickinson v. Valpy*, 10 B. & C. 128, 140, 141; 5 M. & Ry. 126, S. C.; *Wood v. Duke of Argyle*, 6 M. & Gr. 932, per Cresswell, J.; *Harrison v. Heathorn*, 6 M. & Gr. 81, 133, 134, per Tindal, C. J.; *Fox v. Clifton*, 6 Bing. 776, 794, per Tindal, C. J. See also *Kell v. Nainby*, 10 B. & C. 20; *Guidon v. Robson*, 2 Camp. 302, per Lord Ellenborough.

(*l*) *Reynell v. Lewis*, and *Wyld v. Hopkins*, 15 M. & W. 517. These cases appear to the author to be somewhat inconsistent with true principle, but they will probably be upheld on the ground of policy.

(*m*) *Reynell v. Lewis*, and *Wyld v. Hopkins*, 15 M. & W. 517; *Lake v. Duke of Argyle*, 6 Q. B. 477.

validity of the transfer to him, or from otherwise denying his character as a shareholder (*n*).

§ 609. Again, if a party has taken advantage of, or voluntarily acted under, the bankrupt or insolvent laws, he shall not be permitted, as against parties to the proceedings, to deny their regularity (*o*). So, if a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right (*p*); and precisely the same doctrine applies to personal property (*q*). Trespass, also, is not maintainable against a sheriff's officer, who executes process against a man by a wrong name, either by taking his person, or seizing his goods, if before the process he sued out, he is asked his name, and gives such wrong one (*r*); and if a party, who has entered into a bond by a wrong name, is sued in that name, he cannot, as it seems, cause the declaration to be amended at the cost of the plaintiff (*s*), and probably he would be estopped from denying that the name in which he was sued was his real name (*t*). So, if a party, owing a debt not exceeding 20*l.*, were to mislead his creditor by telling him that he dwelt and carried on his business within the jurisdiction of some district court, within

(*n*) *Sheffield and Manchester Rail. Co. v. Woodcock*, 7 M. & W. 574, 582, 583; *Cheltenham and Gt. Western Union Rail. Co. v. Daniel*, 2 Q. B. 281, 292.

(*o*) Like *v. Howe*, 6 Esp. 20; *Clarke v. Clarke*, id. 61; *Gouldie v. Gunston*, 4 Camp. 381; *Watson v. Wace*, 5 B. & C. 153, explained in *Heane v. Rogers*, 9 B. & C. 586, 587; *Mercer v. Wise*, 3 Esp. 219; *Harmar v. Davis*, 7 Taunt. 577; *Flower v. Herbert*, 2 Ves. Sen. 326. See ante, § 582.

(*p*) 3 Sugden Ven. & Pur. 428; recognised by the Court in *Sandys v. Hodgson*, 10 A. & E. 476.

(*q*) *Pickard v. Sears*, 6 A. & E. 469; *Gregg v. Wells*, 10 A. & E. 90; 2 P. & D. 296, S. C.; *Coles v. Bank of England*, 10 A. & E. 437; 2 P. & D. 521, S. C.

(*r*) As to a ca. sa., see *Morgans v. Bridges*, 1 B. & A. 650, 651, and *Magnay v. Fisher*, 5 M. & Gr. 778, 787; 6 Scott, N. R. 588, S. C. This last case appears to overrule *Coote v. Leighworth*, Sir Fra. Moore, 557, and a dictum of Lord Hale in *Thurbane et al., Hardres*, 323. As to a fi. fa., see *Price v. Harwood*, 3 Camp. 108, per Lord Ellenborough; cited and recognised by Cresswell, J., in *Fisher v. Magnay*, 5 M. & Gr. 787. See also *Reeves v. Slater*, 7 B. & C. 486.

(*s*) *Hyckman v. Shotbolt*, 3 Dyer, 279, b. in marg. cited, 6 M. & Gr. 788, n. and coupled with the act of 3 & 4 Will. 4, c. 42, § 11.

(*t*) *R. v. Wooldale*, 6 Q. B. 566, per Wightman, J., citing *Maby v. Shepherd*, Cro. Jac. 640, and *Hyckman v. Shotbolt*, 3 Dyer, 279, b. See also *Williams v. Bryant*, 5 M. & W. 447.

whose jurisdiction the cause of action did not arise, it would seem that, in the event of an action being brought in one of the superior courts, he could not deprive the plaintiff of costs, on the ground that the plaint should have been entered in the district court (u).

§ 610. So, where the order of a judge was bad as a proceeding under the interpleader act (v), for want of a statement of consent upon its face, it was nevertheless held to be conclusive upon the parties, who, by their conduct, had agreed to submit the matter in dispute to the decision of the judge (x). So, although a breach of covenant can in no case be justified by a parol licence to break it (y), a forfeiture occasioned by it may be sometimes waived by the conduct of the covenantee. Thus, where a covenant to insure on the tenant's part was qualified by an option given to the landlord to insure if the tenant made default, and to add the premiums to his rent; it was held, in ejectment for a forfeiture for not insuring, that the defendant might defeat the action, by proving that the landlord had represented to him that he had exercised the power, and had himself duly insured the premises (z). So also, a tenant, who has paid rent, and acted as such, is not permitted, as we have stated more fully in another place (a), to set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for he derived the possession from him as his tenant, and shall not be allowed to repudiate that relation.

§ 611. This doctrine is also applied to the relation of bailor and bailee, and to that of principal and agent; the rule of law being clear that *bailees* or *agents* cannot be permitted to dispute the respective titles of their bailors or principals (b). If, therefore, a

(u) See *Robinson v. Searson*, 6 M. & Gr. 762; *Jefferies v. Watts*, 1 N. R. 153; 9 & 10 Vict. c. 95, §§ 58, 128, 129.

(v) 1 & 2 Will. 4, c. 58. See 1 Vict. c. 45, § 2.

(x) *Harrison v. Wright*, 13 M. & W. 816.

(y) *Doe v. Gladwin*, 6 Q. B. 953, 962; *West v. Blakeway*, 2 M. & Gr. 729.

(z) *Doe v. Sutton*, 9 C. & P. 706; explained by Patteson, J., in *Doe v. Gladwin*, 6 Q. B. 962, 963; *Doe v. Rowe*, Ry. & M. 343; 2 C. & P. 246, S. C. See ante, § 573.

(a) Ante, §§ 82—84.

(b) *Dixon v. Hamond*, 2 B. & A. 310, 313, per Abbott, C. J.; *Story on Agency*, § 217; *Phillips v. Hall*, 8 Wend. 610; *Drown v. Smith*, 3 New Hamp. 299;

warehouseman, wharfinger, banker, attorney, agent, or other depository of goods or monies, has once acknowledged the title of a person as his bailor or principal, and has agreed to hold the goods or monies subject to his order, or to sell the goods and to account for the proceeds, he will be estopped from setting up the title of a third person to the same goods or monies, or from otherwise defeating the rights of his bailor or principal, against his own manifest obligations to him (c). An exception, however, will be allowed, where the bailor or principal has obtained the goods fraudulently or tortiously from the third person (d), provided the defendant can further show, that he was unacquainted with the circumstances when he made the admission (e), and that such third person has actually made a claim to the goods or monies in question (f). Perhaps the bailor's title might also be impugned, should the circumstances be such as to show that he, in connection with some third person, had practised a fraud on the bailee, by representing goods to belong to the bailor, which, in fact, were the property of such third person, if, in this case, additional proof were given, that the defendant, in consequence of the fraudulent misrepresentation, had sustained any real injury (g). On the same principle, a vendor, who has sold goods to a party as a sole purchaser, and has directed his factors to weigh them over to such party, and to enter them in his name in their books, cannot, after such sale and transfer, dispute his title as sole proprietor, or detain the goods, on the authority of a third person, who claims to be a joint purchaser (h).

Eastman v. Tuttle, 1 Cowen, 248; *M'Neil v. Philip*, 1 M'Cord R. 392; *Chapman v. Searle*, 3 Pick. 38, 44; *Jewett v. Torry*, 11 Mass. 219; *Lyman v. Lyman*, id. 317; Story on Bailm. § 102.

(c) *Goaling v. Birnie*, 7 Bing. 339; 5 M. & P. 160, S. C.; *Stonard v. Dunkin*, 2 Camp. 344, per Lord Ellenborough; *Harman v. Anderson*, id. 243, per id.; *Hawes v. Watson*, 2 B. & C. 540; 4 D. & R. 22, S. C.; *Dixon v. Hamond*, 2 B. & A. 310; *Roberts v. Ogilby*, 9 Price, 269; anon. per Gould, J., cited 3 Esp. 115, and there recognised by Lord Kenyon; *Farringdon v. Clerk*, 3 Doug. 124; 2 Chit. R. 429, S. C.; *Holl v. Griffin*, 10 Bing. 246; 3 Moore, 732, S. C.; *Nickolson v. Knowles*, 5 Mad. 47; *Evans v. Nichol*, 3 M. & Gr. 614.

(d) *Hardman v. Willcock*, 9 Bing. 382, n.

(e) Per Alderson, J., in *Goaling v. Birnie*, 7 Bing. 346.

(f) *Betteley v. Reed*, 4 Q. B. 511, 517, 518.

(g) *Scott v. Crawford*, 4 M. & Gr. 1031. (h) *Kieran v. Sanders*, 6 A. & E. 515.

§ 612. Again, in an action against the *acceptor* of a bill, the defendant cannot show that his signature has been forged, if he has accredited the bill, and induced the plaintiff to take it, by saying that the acceptance was his, and that the bill would be duly paid (*h*). But here we must remember, that no consideration of estoppel as between the parties can have any weight, where the rights of the *revenue* intervene; and, consequently, an acceptor of a bill of exchange, which purported on its face to have been drawn abroad, has been allowed to defeat an action, by showing that the bill was in fact drawn in this country, and, being an inland bill, was void for want of a stamp; and this, too, though it was proved that the bill was drawn in the form in which it appeared at the express request of the defendant, and that the plaintiff, a holder for value, was not cognizant of the circumstance (*i*). So, the maker of a banker's cheque may defraud a *bonâ fide* holder for value, by proving that the cheque was post-dated, and as such inadmissible in evidence without a stamp (*j*).

§ 613. The *acceptance* of a bill of exchange is also deemed a *conclusive admission*, as against the acceptor, of the signature of the drawer (*k*), and of his capacity to draw (*l*); and if the bill be payable to the order of the drawer, of his capacity to indorse (*m*); and if it be drawn by procuration, of the authority of the agent to draw in the name of the principal (*n*); and it matters not, in this respect, whether the bill be drawn before or after the

(*h*) *Leach v. Buchanan*, 4 Esp. 226, per Lord Ellenborough; recognised by Erskine, J., in *Sanderson v. Collman*, 4 M. & Gr. 222.

(*i*) *Steadman v. Duhamel*, 1 Com. B. 888.

(*j*) *Field v. Woods*, 7 A. & E. 114; 2 N. & P. 117, S. C.; recognised in *Steadman v. Duhamel*, 1 Com. B. 892, 893. These cases certainly savour of cruel injustice.

(*k*) *Sanderson v. Collman*, 4 M. & Gr. 209; 4 Scott, N. R. 638, S. C.; *Bass v. Clive*, 4 M. & Sel. 13.

(*l*) *Id.* See *Haly v. Lane*, 2 Atk. 182, per Lord Hardwicke.

(*m*) *Taylor v. Croker*, 4 Esp. 187, per Lord Ellenborough; *Pitt v. Chappelow*, 8 M. & W. 616; *Drayton v. Dale*, 2 B. & C. 293; 3 D. & R. 534, S. C. All these cases were recognised by the court in *Sanderson v. Collman*, 4 M. & Gr. 218, 219, 224.

(*n*) *Robinson v. Yarrow*, 7 Taunt. 455; *Jones v. Turnour*, 4 C. & P. 204, per Lord Tenterden.

acceptance (*o*). There is however, in general, no such admission on the part of the acceptor, of the genuineness of the signature of the payee, though he be the same party as the drawer (*p*), or of any other indorser (*q*); and this, too, although at the time of the acceptance, the indorsements were on the bill (*r*). Neither does the acceptance admit, that an agent, who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same (*s*). So, if on a bill payable to the order of the drawer the name of a *real* person as drawer and indorser be *forged*, it seems that the mere acceptance of such bill, in *ignorance* of the forgery, will not preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawing which he is bound to admit (*t*); but if the acceptor, with *knowledge* of the forgery puts the bill in circulation, he will be estopped from disputing the validity of the indorsement equally with that of the drawing (*u*). In this last event the case is considered to fall within the principle of *Cooper v. Meyer*, which decides that if the bill be drawn in a wholly *fictitious* name, and the handwriting of the indorsement be the same as that of the drawing, the acceptor will be estopped from denying it, because he admits that the bill is drawn by *somebody*, that is, by the person who indorses in the same handwriting, and the fair construction to be put on his undertaking is, that he will pay to the signature of the same person who signed for the drawer (*x*).

§ 614. The reasons for this distinction between the case of a drawer and that of an indorser, who signs the bill before the

(*o*) *Schultz v. Astley*, 2 Bing. N. C. 544, 552, 553; 2 Scott, 815, S. C.

(*p*) *Macferson v. Thoytes*, Pea. R. 20; *Bosanquet v. Anderson*, 6 Esp. 44, per Lord Ellenborough; *Cooper v. Meyer*, 10 B. & Cr. 471, per Lord Tenterden.

(*q*) *Id.*

(*r*) *Smith v. Chester*, 1 T. R. 654.

(*s*) *Robinson v. Yarrow*, 7 Taunt. 455; recognised in *Beeman v. Duck*, 11 M. & W. 255.

(*t*) *Beeman v. Duck*, 11 M. & W. 251, 255.

(*u*) *Id.*

(*x*) *Cooper v. Meyer*, 10 B. & C. 468, 471, per Lord Tenterden; 5 M. & Ry. 387, S. C.; explained and recognised by Parke, B., in *Beeman v. Duck*, 11 M. & W. 253—256.

acceptance, are not very clear; but those usually assigned are, that as the acceptor is only presumed to be acquainted with the handwriting of the drawer, it is sufficient if he ascertains that his signature is genuine; that he is not bound to look at the back of the bill at all; that even if he were, he could not be supposed to know the handwriting of indorsers, who would probably be strangers to him; and that a different rule would raise nice questions of fact in every case, as to whether the bill was indorsed before or after acceptance, and would, consequently, embarrass the circulation of negotiable securities, by rendering the position of acceptors hazardous and undefined (*y*).

§ 615. In accordance with the law which estops an acceptor from disputing the genuineness of the drawing, it has been held that the *indorsement* by the payee of a promissory note is a conclusive admission of the handwriting of the maker (*z*); and it was long the prevailing opinion in Westminster Hall that the indorsement of a bill of exchange also operated as an estoppel on the indorser to deny any of the preceding signatures. This last doctrine, however, has lately been questioned by the Court of Exchequer (*a*); and though an indorsee who sues an indorser, may doubtless be saved the necessity of proving the prior indorsements, by alleging in the declaration that the defendant indorsed a bill *purporting to be drawn* by the drawer, and indorsed by him to defendant (*b*); yet if he chooses to aver positively that the bill was drawn by a certain person, it seems that the defendant is still competent in law to deny that fact, though his indorsement is cogent, and almost irresistible, evidence of its truth (*c*). In those cases where the admission is conclusive, it may either be replied by way of estoppel in pais (*d*), or if the matter of estoppel

(*y*) See Story on Bills of Ex. § 263; Robinson v. Yarrow, 7 Taunt. 458, per Park, J.; Smith v. Chester, 1 T. R. 654; Canal Bk. v. Bk. of Albany, 1 Hill, N. Y. R. 287.

(*z*) Free v. Hawkins, Holt, N. P. R. 550, per Gibbs, C. J.

(*a*) Armani v. Castrique, 13 M. & W. 443. But see Critchlow v. Parry, 2 Camp. 182, per Lord Ellenborough.

(*b*) Armani v. Castrique, 13 M. & W. 449, 450, per Parke, B.

(*c*) Id. 451, 452, per Pollock, C. B.

(*d*) Sanderson v. Collman, 4 M. & Gr. 209; 4 Scott, N. R. 638, S.C.

appears on the pleadings, the party may avail himself of it on demurrer (e).

§ 616. It makes *no difference* in the operation of this rule, whether the admission was *true* or *false*, or whether it proceeded from *mistake* or *design*; it being the fact that it *has been acted upon*, which renders it conclusive (f). Thus, where two brokers, instructed to effect insurance, wrote in reply that they had got two policies effected, which was false; in an action of trover against them, brought by the assured for the two policies, Lord Mansfield would not allow them to set up as a defence, that the letter was written by their clerk through mistake, or to deny the existence of the policies, but said that he should consider them as the actual insurers (g). This principle has also been applied to the case of a sheriff, who falsely returned that he had taken bail (h).

§ 617. On the other hand, admissions, which *have not been acted upon*, or by which *the situation of the opposite party has not been prejudiced or altered*, though receivable in evidence against the parties making them, are not conclusive. Thus, if A contracts to sell timber to B, and gives him a delivery order, he may still, on B's bankruptcy, meet an action of trover brought by B's assignees, by showing that the delivery order was invalid, and therefore did not amount to a constructive delivery of the goods, provided B has neither paid for them, nor sold them to a third party (i). So, if the question merely relates to the admissibility of a witness, whom the defendant has acknowledged to be his wife (k), or partner, such acknowledgment will not preclude him

(e) *Armani v. Castrique*, 13 M. & W. 451.

(f) *Doe v. Lambly*, 2 Esp. 636, 636, per Lord Kenyon; *Morgans v. Bridges*, 1 B. & A. 650, per Lord Ellenborough; *Hall v. White*, 3 C. & P. 136, per Best, C. J.; *Stables v. Eley*, 1 C. & P. 614, per Abbott, C. J.; *Howard v. Tucker*, 1 B. & Ad. 712; *Salem v. Williams*, 8 Wend. 483; 9 Wend. 147, S. C.; *Chapman v. Searle*, 3 Pick. 38, 44; *Den v. Oliver*, 3 Hawks, R. 479; *Salem Bk. v. Gloucester Bk.*, 17 Mass. 1, 27.

(g) *Harding v. Carter*, Park on Ins. 4 & 5.

(h) *Simmons v. Bradford*, 15 Mass. 82; *Eaton v. Ogier*, 2 Greenl. 46.

(i) *Lackington v. Atherton*, 7 M. & Gr. 360, 363—365.

(k) *Batthews v. Galindo*, 4 Bing. 610; 1 M. & P. 565; 3 C. & P. 238, S. C.

from showing that in fact the witness is not incompetent (*l*). So, in an action against a marshal for the escape of a prisoner arrested at the suit of the plaintiff, the defendant, by having received the prisoner into custody, is not estopped from disputing the legality of the custody (*m*). Neither will the Court treat as conclusive evidence the admission that his trade was a nuisance, by one indicted for setting it up in another place (*n*); or the admission by the defendant, in an action for adultery, that the "*teterrima causa*" was the wife of the plaintiff (*o*). So, a creditor is not estopped from bringing an action against a sheriff for a false return, by accepting the amount levied on account, and towards the satisfaction, of the debt mentioned in the writ (*p*); and where a person brought an action of trover for a dog, he was held not to be precluded from proving his title to it, though he had previously authorised a third party, against whom the defendant had brought a similar action, to deliver it to the defendant, in the place of paying 50*l.*, which was the alternative directed by the verdict; the third person having, at the time of delivery, demanded back the dog, on behalf of the plaintiff, as his property (*q*). In these, and the like cases (*r*), no wrong is done to the other party, by receiving any legal evidence to show that the admission was erroneous, and by leaving the whole evidence, including the admission, to be weighed by the jury.

§ 618. In some few cases, connected with the administration of public justice, and of government, the admission is held conclusive, on grounds of *public policy*. Thus, in an action for

(*l*) *Brockbank v. Anderson*, 7 M. & Gr. 295, 313; 7 Scott, N. R. 813, 831, 832, S. C.; *Barker v. Stubbs*, 1 M. & Gr. 44; 1 Scott, N. R. 131, S. C.; *Russell v. Blake*, 2 M. & Gr. 374; 2 Scott, N. R. 574; *Poole v. Palmer*, 9 M. & W. 71; *Kell v. Nainby*, 10 B. & C. 20; *Glossop v. Colman*, 1 Stark. R. 25, per Lord Ellenborough; *Parsons v. Crosby*, 5 Esp. 199, per id.; *Ward v. Haydon*, 2 Esp. 552.

(*m*) *Contant v. Chapman*, 2 Q. B. 771.

(*n*) *R. v. Neville*, Pea. R. 91, per Lord Kenyon.

(*o*) *Morris v. Miller*, 4 Burr. 2057; further explained in *Rigg v. Curgenvén*, 2 Wils. 399.

(*p*) *Holmes v. Clifton*, 10 A. & E. 673, overruling *Beynon v. Garrat*, 1 C. & P. 154.

(*q*) *Sandys v. Hodgson*, 10 A. & E. 472.

(*r*) See ante, § 573.

penalties for election bribery, it was held that a man, who had given money to another for his vote, should not be admitted to say that such other person had no right to vote (*s*). So, where the owners of a stage coach took up more passengers than were allowed by statute, and an injury was laid as having arisen from overloading, their conduct was held to be conclusive evidence that the accident was occasioned by the cause assigned (*t*). So, one who has officiously intermeddled with the goods of another recently deceased, is, in favour of creditors, estopped to deny that he is executor (*u*). And if an executrix treats the goods of her testator as the property of her husband, she will not be allowed to object to their being taken in execution for her husband's debt (*v*). Thus also, where a ship-owner, whose ship had been forfeited for breach of the revenue laws, applied to the Secretary of the Treasury for a remission of the forfeiture, on the ground that it was incurred by the master ignorantly and without fraud, and upon making oath to the application, in the usual course, the ship was given up; he was not permitted afterwards to gainsay this statement, and to prove the misconduct of the master, in an action by the latter against himself for wages on the same voyage, even by showing that the fraud had subsequently come to his knowledge (*x*).

§ 619. The mere fact, that an admission was made under oath, does not seem alone to render it conclusive against the

(*s*) *Combe v. Pitt*, 3 Burr. 1586, 1590; 1 Wm. Bl. 524, S. C.; *Rigg v. Curgenvven*, 2 Wils. 395.

(*t*) *Israel v. Clark*, 4 Esp. 259, per Lord Kenyon, recognised by Lord Ellenborough.

(*u*) *Reade's case*, 5 Co. 33, 34; *Toller's Law of Exrs.* 37—41; 1 *Williams, Ex. & Ad.* 192, 193.

(*v*) *Quick v. Staines*, 1 B. & P. 293. See *Fenwick v. Laycock*, 2 Q. B. 108.

(*x*) *Freeman v. Walker*, 6 Greenl. 68. But a sworn entry at the custom-house of certain premises, as being rented by A. B. and C. as partners, for the sale of beer, though conclusive in favour of the Crown, is not conclusive evidence of the partnership, in a civil suit, in favour of a stranger. *Ellis v. Watson*, 2 Stark. R. 453, 478. The difference between this case and that in the text may be, that, in the latter, the party gained an advantage to himself, which was not the case in the entry of partnership; it being only incidental to the principal object, namely the designation of the place where an exciseable commodity was sold.

party; but it adds vastly to the weight of the testimony; throwing upon him the burthen of showing that it was a case of clear and innocent mistake. Thus, in a prosecution under the game laws, proof of the defendant's oath, taken under the income act, that the yearly value of his estate was less than 100*l.*, was held not quite conclusive against him, though very strong evidence of the fact (*y*); and the same rule has been applied, where the fact sworn to was not, as it might be considered in this case, a matter of judgment, but was purely a matter of fact within the knowledge of the party swearing (*z*). Even the defendant's belief of a fact, sworn to in an answer in Chancery, is admissible evidence against him, though not conclusive (*a*).

§ 620. Admissions *in deeds* have already been considered in regard to parties and privies (*b*), between whom they are generally regarded as estoppels, if properly pleaded (*c*); and when not technically so, they are entitled to great weight, from the solemnity of their nature (*d*). But when offered in evidence by a stranger, the adverse party may repel their effect, in the same manner as though they were only parol admissions (*e*).

§ 621. Other admissions, though in writing, not having been acted upon by another to his prejudice, nor falling within the reason before mentioned for estopping the party to gainsay them, are not conclusive against him, but are left at large, to be weighed with other evidence by the jury. Of this sort are *receipts*, or mere acknowledgments, given for goods or money, whether on

(*y*) *R. v. Clarke*, 8 T. R. 220.

(*z*) *Thornes v. White*, 1 Tyr. & Gr. 110.

(*a*) *Doe v. Steel*, 3 Camp. 115, per Lord Ellenborough. Answers in Chancery are always admissible at common law against the party; but do not seem to be held strictly conclusive, merely because they are sworn to. See B. N. P. 236, 237; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Grant v. Jackson*, Pea. R. 203; *Studdy v. Sanders*, 2 D. & R. 347; *De Whelpdale v. Milburn*, 5 Price, 485.

(*b*) Ante, §§ 74—81.

(*c*) *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 193; *Bowman v. Rostron*, 2 A. & E. 295, n.

(*d*) *Doe v. Stone*, 3 Com. B. 176.

(*e*) *R. v. Neville*, Pea. R. 91; *Woodward v. Larking*, 3 Esp. 286; *Mayor of Carlisle v. Blamire*, 8 East, 487, 492, 493.

separate papers (*e*), or indorsed on deeds (*f*), or on negotiable securities (*g*); the *adjustment of a loss*, on a policy of insurance, made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances (*h*); and *accounts rendered*, such as an attorney's bill (*i*), and the like (*k*). A bill in Chancery, if admissible at all against the plaintiff in proof of the admissions it contains, is the feeblest possible evidence, the facts stated therein being frequently little more than the mere suggestions of counsel (*l*).

§ 622. With respect to all *verbal admissions* it may be finally observed, that they ought to be *received with great caution*. The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have clearly expressed his meaning, or the witness may have misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually said (*m*). But where the admission is

(*e*) *Skaife v. Jackson*, 3 B. & C. 421; *Farrar v. Hutchinson*, 9 A. & E. 641; 1 P. & D. 437, S. C.; *Wallace v. Kelsall*, 7 M. & W. 273, per Parke, B. These cases have virtually overruled *Alner v. George*, 1 Camp. 392. For American cases, see *Harden v. Gordon*, 2 Mason, 641, 661; *Fuller v. Crittenden*, 9 Conn. 401; *Ensign v. Webster*, 1 Johns. Cas. 145; *Putnam v. Lewis*, 8 Johns. 389; *Stackpole v. Arnold*, 11 Mass. 27; *Tucker v. Maxwell*, id. 143; *Williamson v. Scott*, 17 Mass. 249.

(*f*) *Straton v. Rastall*, 2 T. R. 366; *Lampon v. Corke*, 5 B. & A. 611, per Holroyd, J.; 612, per Best, J. As to cases where the receipt of money is mentioned in the deed itself, see ante, § 77.

(*g*) *Graves v. Key*, 3 B. & Ad. 313.

(*h*) *Reyner v. Hall*, 7 Taunt. 725; *Shepherd v. Chewter*, 1 Camp. 274, 276, note by the reporter. *Adams v. Sanders*, M. & M. 373; *Christian v. Coombe*, 2 Esp. 489.

(*i*) *Loveridge v. Botham*, 1 B. & P. 49.

(*k*) See *Bacon v. Chesney*, 1 Stark. R. 192, 193, n. (*b*); *Dawson v. Remnant*, 6 Esp. 24.

(*l*) B. N. P. 235; 2 Ph. Ev. 28; *Doe v. Sybourn*, 7 T. R. 3, per Lord Kenyon.

(*m*) *Earle v. Picken*, 5 C. & P. 642, n., per Parke, J.; *R. v. Simons*, 6 C. & P. 510, per Alderson, B.; *Williams v. Williams*, 1 Hagg. Consist. R. 304, per Sir Wm. Scott. Alciatus expresses the sense of the civilians, to the same effect, where, after speaking of the weight of a judicial admission, "*propter majorem certitudinem, quam in se habet*," he adds—"Quæ ratio non habet locum quando ista

deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature (n).

confessio probaretur per testes; imo est minus certa cæteris probationibus," *tr.* Alciat. de Præsumpt. Pars Secund. Col. 682, n. 6. See 2 Poth. on Obl. by Evans App. No. 16, § 13; *Malin v. Malin*, 1 Wend. 625, 652; *Lench v. Lench*, 10 Va. 517, 518, cited with approbation, in 6 Johns. Ch. R. 412, and in *Smith v. Burnham*, 3 Sumn. 438; *Stone v. Ramsay*, 4 Monroe, 236, 239; *Myers v. Baker*, Hardin 544, 549; *Perry v. Gerbeau*, 5 Martin, N. S. 18, 19; *Law v. Merrill*, 6 Wend. 268, 277.

(n) *Rigg v. Curgenvin*, 2 Wils. 395, 399; *Glassford Ev.* 326; *Com. v. Knapp*, 9 Pick. 507, 508, per Putman, J. As to *Admissions* by *Agents*, see §§ 411—413

CHAPTER XV.

OF CONFESSIONS.

§ 623. THE only remaining topic, under the general head of admissions, is that of CONFESSIONS of guilt in criminal prosecutions, which we now propose to consider ; and here, also, as we have just remarked in regard to admissions (a), the evidence of *verbal* confessions of guilt is to be *received with great caution*. For not only is there considerable danger of mistake, from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory (b),—but the zeal which too generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition, in the persons engaged in pursuit of evidence, to rely on slight grounds of suspicion, which are exaggerated into sufficient proof (c),—together with the character of the persons who are sometimes necessarily called as witnesses, in cases of secret and atrocious crime,—all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where, in civil actions, it would have been received. The weighty observation of Mr. Justice Foster should also be kept in mind, that “this evidence is not, in the ordinary course of things, to be disproved by that sort of

(a) Ante, § 622.

(b) See *Earle v. Picken*, 5 C. & P. 542, n., per Parke, B. ; *R. v. Simons*, 6 C. & P. 540, per Alderson, B. ; *Foster Cr. Law*, 243 ; *Coleman's case*, cited in *Joy on Confess.* 108. In *Resp. v. Fields, Peck*, R. 140, the Court observed, “How easy is it for the hearer to take one word for another, or to take a word in a sense not intended by the speaker ; and for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning. For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do.”

(c) For a curious instance of this kind of exaggeration, see the evidence adduced in support of *Hugh Macauley Boyd's* claim to the authorship of *Junius*, 1 *Woodfall's Junius*, *133—*137.

negative evidence, by which the proof of plain facts may be, and often is, confronted" (d).

§ 624. In addition to these sources of distrust, which are often sufficient to raise a serious doubt whether the confession given in evidence was actually made by the prisoner in the words or to the effect stated by the witnesses, there is yet another reason why caution should be employed in receiving and weighing confessions. The statements, though made as deposed to, may be *false*. The prisoner, oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue confession (e); and the same result may have arisen from a morbid

(d) Foster Cr. Law, 243. See also 1 Ph. Ev. 397; *Lench v. Lench*, 10 Ves. 518; *Smith v. Burnham*, 3 Sumn. 438; 4 Bl. Com. 357; *R. v. Crossfield*, 26 How. St. Tr. 109, per Mr. Adams, in his address to the jury. The civilians placed little reliance on naked confessions of guilt, not corroborated by other testimony. Carpzovius, after citing the opinion of Severus to that effect, and enumerating the various kinds of misery which tempt its wretched victims to this mode of suicide, adds—"quorum omnium ex his fontibus contra se emissa pronuntiatio, non tam delicti confessione firmati quam vox *doloris*, vel *insanientis* oratio est." B. Carpzov. Pract. Rerum Criminal. Pars III. Quæst. 114, p. 160. So also, in the Ecclesiastical Courts, it is regarded with great distrust. See per Sir W. Scott, in *Williams v. Williams*, 1 Hagg. Cons. R. 304.

(e) Of this character was the remarkable case of the two Boorns, convicted in the Supreme Court of Vermont, in Bennington county, in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of a weak mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a violent blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time that he was murdered; which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided; but, in 1819, one of the neighbours having repeatedly dreamed of the murder, with great minuteness of circumstance both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket knife of Colvin and a button of his clothes were found in an old open cellar in the same field, and in a hollow stump not many rods from it were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death to that of perpetual imprison-

ambition to obtain an infamous notoriety (*f*), from an insane or criminal desire to be rid of life, from a reasonable wish to commence a new career in another hemisphere, from an almost pardonable anxiety to screen a relative or a comrade (*g*), or even from the delusion of an overwrought and fantastic imagination (*h*). Still the actual instances of false confessions of crime are very rare, and their just value has been happily stated by one of the most accomplished of modern jurists. "Whilst such anomalous cases," says the writer, "ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked, or so urged by the accused's counsel, as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the Court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning,

ment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some misjudging friends, that, as they would certainly be convicted upon the circumstances proved, their only chance for life, by commutation of punishment, depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. This case, of which there is a Report in the Law Library of Harvard University, is critically examined in a learned article in the *North American Review*, vol. 10, p. 418—429. For another case of false confession under a promise of pardon, see a case cited in note to *Warickshall's case*, 1 *Lea. C. C.* 264, n.

(*f*) One or other of these motives probably induced Hubert falsely to confess that he set fire to London in 1666. His confession cost him his life. See 6 *How. St. Tr.* 807—809, 819—821; and *Wills on Circumst. Ev.* 88, 89. See also General Lee's assertion that he was the author of *Junius*, as narrated in 1 *Woodfall's Junius*, *122, *123.

(*g*) Mr. Joy mentions a case of an innocent person making a false constructive confession, in order to fix suspicion on himself alone, that his guilty brothers might have time to escape; a stratagem which was completely successful; after which he proved an alibi in the most satisfactory manner. Joy on Confessions, 107; 1 *Chitty Cr. Law*, 85, S. C.

(*h*) This is probably the true key to the frequent confessions of the poor wretches, who, in the good old times, were wont to be tried for witchcraft. See *Mary Smith's case*, 2 *How. St. Tr.* 1049; *Essex witches*, 4 *id.* 817; *Suffolk witches*, 6 *id.* 647; *Devon witches*, tried in 1682, 8 *id.* 1017, 1037.

is no less unprofessional than impolitic; and should be regarded as offensive to the intelligence both of the Court and jury" (i).

§ 625. Indeed, all reflecting men are now generally agreed, that *deliberate and voluntary confessions of guilt, if clearly proved*, are among the most effectual proofs in the law; their value depending on the sound presumption, that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience (j). Such confessions, therefore, so made by a prisoner to any person, at any time, and in any place, are at common law receivable in evidence (k), while the degree of credit due to them must be estimated by the jury according to the particular circumstances of each case.

§ 626. Confessions may be divided into two classes, namely, *judicial* and *extra-judicial*. *Judicial confessions* are those which are made before the magistrate, or in court, in the due course of legal proceeding; and it is essential that they be made of the free will of the party, and with full knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate pursuant to statute; and the plea of guilty to an indictment, made in open court. Either of these is sufficient by itself to support a conviction, though followed by a sentence of death, they both being deliberately and solemnly made under the protecting caution and oversight of the judge. Even on trials for treason or misprision of treason, where the law in its clemency affords to the accused unusual protection, a willing confession without violence in open court, renders it unnecessary to call witnesses in support of the charge (l); and perhaps, also, though this would seem to be highly

(i) Hoffman's Course of Legal Study, vol. i. p. 367.

(j) Warickshall's case, 1 Lea. C. C. 263; 2 East, P. C. 658, S. C.; Lambe's case, 2 Lea. C. C. 554, 555; Mortimer v. Mortimer, 2 Hagg. Cons. R. 315; Harris v. Harris, 2 Hagg. Ec. R. 409; 1 Gilb. Ev. by Lofft, 216; Dig. lib. 42, tit. 2 de Confess.; Van Leeuwen's Comm. b. v. ch. xxi. § 1; 2 Poth. on Obl. by Evans, App. Numb. xvi. § 13.

(k) Lambe's case, 2 Lea. C. C. 554; M'Nally's Ev. 42, 47.

(l) 7 Will. 3, c. 3, § 2; extended to Ireland by 1 & 2 Geo. 4, c. 24; Gregg's case, 14 How. St. Tr. 1375.

questionable (*m*), a confession made during the solemnity of an examination before a magistrate or other person having authority to take it, will, if satisfactorily proved by two witnesses, be deemed sufficient evidence to warrant a conviction (*n*). The canon law, too, scrupulous as it is on the subject of evidence, regards a *judicial* and free confession, made out of prison, and without any just fear of danger, as amounting, in the phrase of the spiritual courts, to a *plena probatio* (*o*). The doctrine of the Roman law was also to the like effect ;—*confessos in jure pro judicatis haberi placet* ;—and, indeed, it may be deemed a rule of universal jurisprudence (*p*).

§ 627. *Extra-judicial confessions* are those, which are made by the party elsewhere than before a magistrate, or in court ; this term embracing not only *express* confessions of crime, but all those admissions and acts of the accused, from which guilt may be *implied*. All voluntary confessions of this kind are receivable in evidence, on being proved like other facts ; and this, too, on trials for treason or misprision of treason, in like manner as on ordinary indictments ; except, only, that on these more serious occasions, they will not supply the want of the two witnesses, whose testimony is required by the Act of William the Third. Consequently, whether these confessions be proved by one witness or two, they can only be treated as *corroborative* evidence of the *overt* act charged (*q*) ; unless such overt act be the assassination of the Queen, or any attempt to injure her person, in which event the accused may be convicted on the same evidence as an ordinary murderer (*r*).

§ 628. Whether, on ordinary indictments for felony or misdemeanor, *extra-judicial confessions uncorroborated* by any other proof of the *corpus delicti*, are of themselves sufficient to justify a conviction of the prisoner, has been gravely doubted. In the Roman

(*m*) *Berwick's case*, Foster Cr. Law, 10 ; 18 How. St. Tr. 370, S. C. ; *R. v. Willis*, 15 How. St. Tr. 624, per Ward, C. B., and 643, per Eyre, S. G.

(*n*) Foster Cr. Law, 240—243. See post, n. (*q*). (*o*) *Ayliffe Par.* 545.

(*p*) Cod. Lib. 7, tit. 59 ; 1 Poth. on Obl. pt. iv., ch. 3, § 1, num. 798 ; Van Leeuwen's Comm. B. 5, ch. 21, § 2 ; Mascard. De Probat. vol. i. Concl. 344.

(*q*) *R. v. Willis*, 15 How. St. Tr. 623—625 ; Foster Cr. Law, 240—243 ; *R.*

v. Crossfield, 26 How. St. Tr. 55—57.

(*r*) 39 & 40 Geo. 3, c. 93 ; 1 & 2 Geo. 4, c. 24, § 2, Ir. ; 5 & 6 Vict. c. 51, § 1.

law, such naked confessions amounted only to a *semiplena probatio*, upon which alone no judgment could be founded; and at most, the party could only, in particular cases, be put to the torture. But if voluntarily made in the presence of the injured party, or if re-iterated at different times in his absence, and persisted in, they were received as plenary proof (*s*). In each of the English cases usually cited in favour of the sufficiency of this evidence, there was some corroborating circumstance. Thus, in the case of Eldridge (*t*), who was indicted for larceny of a horse, the beast was found in his possession, and he had sold it for £12 after asking £35, which last was its fair value. In the case of Falkner and Bond (*u*), the person robbed was called upon his recognizance, and it was proved that one of the prisoners had endeavoured to send a message to him to keep him from appearing. In White's case (*w*) there was strong circumstantial evidence, both of the larceny of the oats from the prosecutor's stable, and of the prisoner's guilt; part of which evidence was also given in Tippet's case (*x*), who was indicted for the same larceny; and in that case there was the additional proof that the prisoner was an under ostler in the same stable. In all these cases, too, except that of Falkner and Bond, the confessions were solemnly made before the examining magistrate, and taken down in due form of law; while, in the case of Falkner and Bond, the confessions were repeated, once to the officer who apprehended them, and afterwards, on hearing the depositions read over which contained the charge. So, in Stone's case (*y*), which is a very brief note, it does not appear that the *corpus delicti* was not otherwise proved; on the contrary, the natural inference from the report is, that it was. Wheeling's case, indeed, seems to be an exception; but it is far too briefly reported to be relied on as an authority. It is in these words: "But in the case of John Wheeling, tried before Lord Kenyon, at the Summer Assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence" (*z*). In

(*s*) N. Everhard. Concil. xix. 8, lxxii. 5, cxxxi. 1, clxiv. 1, 2, 3, clxxxvi. 2, 3, 11; Mascard. De Prob. vol. 1, Concl. 347, 349; Van Leeuwen's Comm. B. 5, ch. 21, § 4, 5; B. Carpzov. Practic. Rerum Criminal. Pars II., Quæst. 60, n. 8.

(*t*) Russ. & Ry. 440.

(*u*) Id. 481.

(*w*) Id. 508.

(*x*) Id. 509.

(*y*) Dyer, 215, pl. 50.

(*z*) 1 Lea. C. C. 311, (*n*).

the United States, the prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient to warrant his conviction; and this opinion certainly best accords with the humanity of the criminal law, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases; and it seems countenanced by approved writers on this branch of the law (a).

§ 629. In the proof of confessions, as in the case of admissions in civil causes (b), *the whole of what the prisoner said* on the subject, at the time of making the confession, should be taken together. This rule is the dictate of reason, as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connexion with the crime; but it is not reasonable to assume, that the entire proposition, with all its limitations, was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation. As the meaning of a writing must, in civil cases, be collected from the whole taken together, and as, when several instruments relating to the same matter have been executed at one time, they are all equally resorted to for the purpose of ascertaining the intention of the parties; so here, if one part of a conversation is relied on, as proof of a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; or at least so much as is explanatory of the part already proved against him, and perhaps, also, in favorem vitæ, all that was relative to the subject-matter in issue (c). For, as has been already observed respecting admissions (d), unless the whole is received and considered, the true meaning of the part, which is good evidence against him, cannot be ascertained. But if, after the entire statement of the prisoner has been given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so; and then the whole

(a) Guild's case, 5 Halst. 163, 185; Long's case, 1 Hayw. 524 (455); 4 Hawk. P. C. 425, B. 2, c. 46, § 36; 2 Russ. C. & M. 825, 826, n. (b); and R. v. Edgar, there cited.

(b) Ante, §§ 510—515.

(c) Per Ld. C. J. Abbott, in The Queen's case, 2 B. & B. 297, 298; as qualified by the Court in Prince v. Samo, 7 A. & E. 634, 635; R. v. Jones, 2 C. & P. 629; R. v. Higgins, 2 C. & P. 603.

(d) Ante, § 510, and cases there cited.

testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another (e). Even without such contradiction it is not to be supposed, that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing (f). If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury; but they are not bound to give weight to it on that account, being at liberty to judge of it like other evidence by all the circumstances of the case (g). And if the confession implicates other persons by name, still it must be proved as it was made, not omitting the names; but the Judge will instruct the jury, that it is not evidence against any but the prisoner who made it (h).

§ 630. Before any confession can be received in evidence in a criminal case, it must be shown that it was *voluntary*; for, to adopt the somewhat inflated language of Chief Baron Eyre, "a confession, forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected" (i). The material question, consequently, is, whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is, as we have seen (j), addressed to the Judge, who admits or rejects the proof of the confession, as he may or may not find it to have been drawn from the prisoner

(e) *R. v. Jones*, 2 C. & P. 629.

(f) *R. v. Higgins*, 3 C. & P. 603, per Parke, J.; *R. v. Steptoe*, 4 C. & P. 397, per Park, J.; *Resp. v. McCarty*, 2 Dall. 86, 88.

(g) Per Littledale, J., in *R. v. Clewes*, 4 C. & P. 221.

(h) *R. v. Hearne*, 4 C. & P. 215, per Littledale, J.; *R. v. Clewes*, ib. 221, 225, per id.; *R. v. Fletcher*, ib. 250, per id.; 1 Lew. C. C. 107, S. C.; *R. v. Hall*, 1 Lew. C. C. 110, per Alderson, B.; *R. v. Foster*, id. per Lord Denman; *R. v. Walkley*, 6 C. & P. 175, per Gurney, B., who said it had been much considered by the Judges; Parke, J., thought otherwise in *Barstow's case*, 1 Lew. C. C. 110.

(i) In *Warickahall's case*, 1 Lea. C. C. 263, 264; *McNally's Ev.* 47; *Knapp's case*, 10 Pick. 489, 490; *Chabcock's case*, 1 Mass. 144.

(j) Ante, § 21.

by the application of these motives. This matter resting wholly in the discretion of the Judge, it is difficult to lay down particular rules, *a priori*, for the government of that discretion; and the more so, as much must necessarily depend on the age, experience, intelligence, and character of the prisoner, and the circumstances under which the confession was made (*k*). Language sufficient to overcome the mind of one, may have no effect upon that of another; a consideration which may serve to reconcile some contradictory decisions, where the principal facts appear similar in the reports, but the lesser circumstances, though often very material in such preliminary inquiries, are omitted. Still it cannot be denied, that this rule has been sometimes extended quite too far, and been applied to cases where there could be no reason to suppose, that the inducement had any influence upon the mind of the prisoner.

§ 631. Difficult as it is to lay down any definite rule on this subject, which can be used as an unerring guide in every supposable case, there are still some points, both in regard to the *person by whom the promise or threat is made*, and also in regard to the *nature of the inducement* itself, on which the judges appear to be pretty generally agreed, and a knowledge of which will materially assist the inquiry, whether any particular confession should be admitted in evidence or rejected. And first, as to *the person by whom the inducement is offered*. Here it is very clear, that if the promise or threat be made by any one *having authority* over the prisoner or the prosecution (*l*), as, for instance, by the prosecutor (*m*), the master or mistress of the prisoner (*n*), the constable (*o*),

(*k*) McNally's Ev. 43; Nute's case, 6 Petersdorff's Abr. 82; Knapp's case, 10 Pick. 496.

(*l*) R. v. Parratt, 4 C. & P. 570, per Alderson, B., which was a confession by a sailor to his captain, who threatened him with prison, on a charge of stealing his watch; R. v. Thompson, 1 Lea. C. C. 291; R. v. Fleming, 1 Arm. Mac. & Ogle, 330.

(*m*) R. v. Cass, 1 Lea. C. C. 293, n. (*a*), per Gould, J.; R. v. Jones, R. & R. 152; R. v. Jenkins, id. 492.

(*n*) R. v. Upchurch, 1 Moo. C. C. 465; R. v. Taylor, 8 C. & P. 734, per Patteson, J.; R. v. Hearn, C. & Marsh. 109, per Coltman, J.; R. v. Hewett, id. 534, per Patteson, J.

(*o*) R. v. Morton, 2 M. & Rob. 514, per Coleridge, J.; R. v. Swatkins, 4 C. & P. 548, per Patteson, J.; R. v. Mills, 6 id. 146, per Gurney, B.; R. v. Shepherd, 7 id. 579, per Gaselee, J.

or other officer or person (*h*) having him in custody, a magistrate (*i*), or the like (*j*), the confession will be rejected as not being voluntary. And the same rule will prevail, though the inducement was not actually offered by the person in authority, if it were held out by *any one in his presence*, and he, by his silence, has *sanctioned* its being made (*k*). In these cases, as the authority possessed by the persons who make or sanction the inducement, is calculated both to animate the prisoner's hopes of favour on the one hand, and, on the other, to inspire him with awe, and in some degree to overcome the powers of his mind, the law assumes the possibility, if not the probability, of his making an untrue admission, and consequently withdraws from the consideration of the jury any declaration of guilt, which the prisoner, under these circumstances, may be induced to make. Moreover, and this is a more sensible reason for the rule, the admission of such evidence would naturally lead the inferior agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners, in the hope of wringing from them a reluctant confession. It has been argued with apparent reason, that a confession made upon the promises or threats of a person, assuming to act in the capacity of an officer or magistrate, and erroneously believed by the prisoner to possess such authority, ought, upon the above principles, to be excluded; but the point is not known to have received any judicial consideration.

§ 632. Whether a confession *made to a person, who, having no authority, has held out an inducement*, will be receivable, is a question upon which learned judges are known to entertain opposite opinions (*l*). On two occasions Mr. Justice Bosanquet distinctly

(*h*) *R. v. Enoch*, 5 C. & P. 539, per Park and Taunton, Js. There the prisoner was left in charge of a woman, to whom she confessed.

(*i*) *R. v. Drew*, 8 C. & P. 140, per Coleridge, J.; *R. v. Cooper*, 5 C. & P. 535, per Parke, J.; *Guild's case*, 5 Halst. 163.

(*j*) Qu. a surgeon; see *R. v. Kingston*, 4 C. & P. 387. Qu. also, the husband of the prisoner, *R. v. Langher*, 2 C. & Kir. 225.

(*k*) *R. v. Pountney*, 7 C. & P. 302, per Alderson, B.; *R. v. Taylor*, 8 C. & P. 734, per Patteson, J.; *R. v. Drew*, 8 C. & P. 140, per Coleridge, J.; *R. v. Simpson*, 1 Moo. C. C. 410, explained in *Joy on Confess.* 9—11; *R. v. Langher*, 2 C. & Kir. 225, per Pollock, C. B.

(*l*) *R. v. Spencer*, 7 C. & P. 776, per Parke, B. See also, *R. v. Pountney*, id. 302, per Alderson, B.; *R. v. Gibbons*, 1 C. & P. 98, n. (*b*).

held, that *any* person telling a prisoner that it would be better for him to confess, would *always* exclude any confession made to *that person* (m); and one or two other cases may perhaps be cited in support of the same view (n). On the other hand, Mr. Justice Patteson is reported to have said in a more recent case, that, *in the opinion of the judges*, any confession is receivable, unless some inducement has been held out by a person *in authority*; and his Lordship added, with reference to the particular facts of the case before him, that he would have received in evidence the statement made by the prisoner to an indifferent person, had the inducement been offered by such person alone (o). Both these contradictory decisions would seem to be open to one and the same objection; namely, they endeavour to define, *as a strict rule of law*, what circumstances shall be deemed, *in all cases*, to have unduly influenced the mind of the prisoner in making the confession. Now although such a rule has been laid down with reference to inducements offered by persons in authority, because, being thought to succeed in a large majority of instances, it has, for the sake of uniformity and precision, been wisely adopted as applicable to them all; yet it by no means follows, that the same rule will equally apply to all promises and threats held out by private persons. These last inducements may vary in their effect to almost any conceivable extent. They will often be obviously insufficient to produce the slightest influence on even the feeblest mind; and in such cases the confession which follows, but which, in fact, is

(m) *R. v. Dunn*, 4 C. & P. 543; *R. v. Slaughter*, id. 544, n. (b). In *R. v. Downing*, Chelmsford Sp. Ass. 1840, MS., where a woman was indicted for child-murder, a confession made by her to an elderly woman, who was her neighbour and nurse, and who told her it was better for her to confess, was held by Lord Abinger to be inadmissible; and his Lordship refused to admit evidence of a confession subsequently made to a surgeon. Sed qu.

(n) For instance, *R. v. Kingston*, 4 C. & P. 387, where Parke and Littledale, Js., rejected a confession made to a surgeon who had held out an inducement. Perhaps, however, this case may rest on the ground that the surgeon was a person in authority. In *R. v. Walkley*, 6 C. & P. 175, where evidence of a confession was held inadmissible by Gurney, B., it does not appear, whether or not the witness, to whom the statement was made, and who had offered the inducement, was a person in authority; and the same observation applies to the case of *R. v. Thomas*, id. 353, per Patteson, J. See also *Guild's case*, 5 Halst. 163; and *Knapp's case*, 9 Pick. 496, 500—510.

(o) *R. v. Taylor*, 8 C. & P. 734.

not *consequent* on them, should be admitted in evidence. On the other hand, an inducement held out by a private individual may be, and, indeed, frequently is, quite as much calculated to cause the prisoner to utter an untrue statement, as any promise made to him by a person in authority; in these cases, the confession made to such private person should be excluded. It is therefore submitted, that without laying down any positive rule, whether of admission or rejection, the Judge should determine each case on its own merits; only bearing in mind, that his duty is to reject such confessions only, as would seem to have been wrung from the prisoner, under the supposition that it would be best for him to admit that he was guilty of an offence which he really never committed (*p*).

§ 633. Be the law, however, on this particular point what it may, thus much is clear, that a promise or threat made by an *indifferent person*, who has officiously interfered without any kind of authority, will *never* operate to exclude a confession made to *any other person* who has not himself sanctioned the inducement (*q*). This rule is founded, partly on the supposition that such inducements will seldom much influence the conduct of the prisoner; but chiefly on the ground that, were a contrary rule to prevail, it would probably open a wide door to collusive practices, and would certainly go far towards rendering all confessions inadmissible. Prisoners, who wished to avoid the consequences of their inconvenient acknowledgments of guilt, might with ease find associates ready to affirm, that they had advised them to confess; and even if this stratagem were not attempted, injudicious advice given by meddling persons, would frequently have the effect of shutting out a distinct and positive confession, and of thus embarrassing the course of criminal justice.

§ 634. Where promises or threats have been once used of such

(*p*) *R. v. Court*, 7 C. & P. 487, per Littledale, J.

(*q*) *R. v. Gibbons*, 1 C. & P. 97, per Park, J., and Hullock, B.; *R. v. Hardwick*, id. 98, n. (*b*), per Wood, B.; *R. v. Row*, R. & R. 153; *R. v. Tyler*, 1 C. & P. 129, per Hullock, B.

a nature as to render a confession inadmissible, all *subsequent* admissions of the same or the like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume, that the delusive hope or fear which *influenced* the first confession has been *effectually dispelled* (r). Where, however, it appears, to the satisfaction of the judge, that the improper *influence was totally done away before* the confession was made, the evidence will be received. Thus, where a magistrate told a prisoner charged with murder, that if he was not the man who struck the fatal blow, and would disclose all he knew respecting the matter, he would use his influence to protect him; but, on subsequently receiving a letter from the Secretary of State refusing mercy, he communicated its contents to the prisoner, it was held that a confession, which the prisoner afterwards made to the coroner, who had also duly cautioned him, was clearly voluntary, and as such it was admitted (s). So, where the accused had been induced by promises of favour to make a confession, which was for that cause excluded, but some months afterwards, and after he had been solemnly warned by two magistrates that he must expect death and prepare to meet it, he again fully acknowledged his guilt, this latter confession was received in evidence (t). Indeed, it may be generally laid down, that, though an inducement has been held out by an officer, a prosecutor, or the like, and though a confession has been made in consequence of such inducement, still, if the prisoner be subsequently warned by a person in equal or superior authority, that what he may say will be evidence against himself, or that a confession will be of no benefit to him;—or if he be simply cautioned by the magistrate not to say anything against himself;—any admission of guilt afterwards made, will

(r) Joy on Confess. 69; Guild's case, 5 Halst. 180; R. v. Hewett, C. & Marsh. 534, per Patteson, J., recognising Meynell's case, 2 Lew. C. C. 122, per Taunton, J.; Sherrington's case, id. 123, per Patteson, J.; R. v. Cooper, 5 C. & P. 535, per Parke, J.; Bell's case, cited by Joy on Confess. 71, and by McNally on Ev. 43, per Lord Kilwarden, C. J., and Carleton, C. J. of C. P.; Roberts' case, 1 Devereux R. 259, 264; R. v. Walsh, Ir. Cir. R. 866, per Jackson, J.

(s) R. v. Clewes, 4 C. & P. 221, per Littledale, J. See also R. v. Dingley, 1 C. & Kir. 637.

(t) Guild's case, 5 Halst. 163, 168

be received as a voluntary confession (*u*). There may be more doubt in the case, if the promise has proceeded from a person of superior authority, as a magistrate, and the confession is afterwards made to an inferior officer; because a caution from this latter person might be insufficient to efface the expectation of mercy, which had previously been raised in the prisoner's mind (*v*).

§ 635. We come now to the *nature of the inducement*; and here it may be laid down as a general rule, that in order to exclude a confession, the inducement, whether it be in the shape of a promise, a threat, or mere advice, must have reference to the prisoner's *escape from the criminal charge* against him. A confession, therefore, will be received, though it were induced by *spiritual exhortations*, whether of a clergyman (*w*) or of any other person (*x*); for such a confession can scarcely be regarded as *untrue*; and the law of England, Ireland, and America, unlike that which prevails in Scotland (*y*), or in other countries subject to the Roman law (*z*), does not, as we shall presently have occasion to point out (*a*), regard penitential confessions to a priest in the light of privileged communications. So, a promise of some merely *collateral benefit or boon*, as for instance, a promise to give the prisoner some

(*u*) *R. v. Howes*, 6 C. & P. 404, per Lord Denman; *R. v. Lingate*, 1 Ph. Ev. 410; *R. v. Rosier*, id. 410, 411; *R. v. Bryan, Jebb*, C. C. 157; *Joy on Confess.* 72—75. See *R. v. Richards*, 5 C. & P. 318.

(*v*) *R. v. Cooper*, 5 C. & P. 535, per Parke, J.

(*w*) *R. v. Gilham*, 1 Moo. C. C. 186; explained in *Joy on Confess.* 52—56; *Com. v. Drake*, 15 Mass. 161.

(*x*) *R. v. Wild*, 1 Moo. C. C. 452; *R. v. Nute*, 2 Russ. C. & M. 532, 533; recognised in *R. v. Hewett, C. & Marsh*, 536, per Patteson, J.; *R. v. Gibney, Jebb*, C. C. 15.

(*y*) 2 Alison Cr. Law of Scotland, 586, cited in *Joy on Confess.* 57, n. (*a*), 58.

(*z*) In the Roman law, penitential confessions to the priest are encouraged for the relief of the conscience, and the priest is bound to secrecy by the peril of punishment. "*Confessio coram sacerdote in poenitentia facta non probat in judicio; quia censetur facta coram Deo*; imo, si sacerdos eam enunciet, incidit in poenam." Mascardus, *De Probat.*, Vol. I., Concl. 377. It was lawful, however, for the priest to testify in such cases to the fact, that the party had made such a penitential confession to him as the church requires, and that he had enjoined penance upon him; and, with the express consent of the penitent, he might lawfully testify to the substance of the confession itself. *Ib.*

(*a*) §§ 664, 665, post.

spirits (*b*), or to strike off his hand-cuffs (*c*), or to let him see his wife (*d*), will not be deemed such an inducement as will authorise the rejection of a confession made in consequence. Neither will an inducement held out to a prisoner with reference to one charge exclude a consequent confession which relates to another (*e*); unless the two offences be so blended together as to constitute in reality but one transaction (*f*). So, where a woman was indicted for concealing the birth of her child, her acknowledgment that she had been confined was received in evidence, though made in consequence of the doctor having threatened that he would examine her person (*g*). So, also, confessions will in general be admitted, though caused by intimidating language, provided the intimidation has had no reference to the charge, and was not otherwise calculated to produce any untrue statement (*h*).

§ 636. Moreover, if no inducement has been held out relating to the charge, it matters not *in what way* the confession has been obtained; for whether it were induced by a solemn *promise of secrecy*, even confirmed by an oath (*i*); or by reason of the prisoner having been made *drunken* (*j*); or even by any *deception* practised upon him, or false representation made to him for that purpose (*k*); it will be equally admissible, however much the mode of obtaining it may be open to censure, or may render the statement itself liable to suspicion. Much less will a confession be rejected, merely

(*b*) *R. v. Sexton*, cited *Joy on Confess.* 17—19, is to contrary; but this case, which was decided by Best, J., is probably not law. See *Observations of Mr. Greaves* in 2 *Russ. C. & M.* 827, n. (*k*).

(*c*) *R. v. Green*, 6 C. & P. 655, per Bosanquet and Taunton, Js.

(*d*) *R. v. Lloyd*, 6 C. & P. 393, per Patteson, J.

(*e*) *R. v. Warner*, cited 2 *Russ. C. & M.* 845, per Littledale, J.

(*f*) *R. v. Hearn*, C. & Marsh. 109, per Coltman, J.

(*g*) *R. v. Cain*, 1 *Crawf. & Dix*, C. C. 37.

(*h*) See *R. v. Thornton*, 1 *Moo. C. C.* 27, 28.

(*i*) *R. v. Shaw*, 6 C. & P. 372, per Patteson, J.; *Com. v. Knapp*, 9 *Pick.* 496, 500—510.

(*j*) *R. v. Spilsbury*, 7 C. & P. 187, per Coleridge, J., qu. on the ground that in *vino veritas*. In the case of *R. v. Sippet*, which was tried at Maidstone Ass. 1839, a confession made by the prisoner while *talking in his sleep*, was tendered in evidence; but Tindal, C. J., doubting its admissibility, it was withdrawn. MS.

(*k*) *R. v. Derrington*, 2 C. & P. 418, per Garrow, B.; *R. v. Burley*, 2 *Stark. Ev.* 13, n. (*z*), and 37, per Garrow, B., afterwards confirmed by all the judges.

because it has been elicited by *questions* put to the prisoner, whether by a magistrate (*l*), officer (*m*), or private person (*n*); and the form of the question is immaterial, even though it assumes the prisoner's guilt (*o*). So, if a prisoner makes a confession under the hope, held out by a person *not in authority*, that he will thereby be admitted as Queen's evidence, this confession will be received against him (*p*); and the same result will follow, though his hopes have been excited by a constable or other officer, if on the trial of his accomplices he refuses to make a full disclosure, and thus violates the condition on which his claim to favour can alone rest (*q*). So, what the accused has been *overheard* muttering to himself, or saying to his wife or to any other person in confidence, will be receivable in evidence (*r*); though the wife, attorney or counsel of the prisoner will not, on grounds that will be presently explained, be themselves allowed to reveal what he has said to them (*s*). A voluntary confession, too, is admissible, to whomsoever it may have been made, though it does not appear that the prisoner was *warned* that what he said would be used against him; nay, though it appears on the contrary that he was *not* so warned (*t*).

(*l*) *R. v. Rees*, 7 C. & P. 569, per Lord Denman; *R. v. Bartlett*, *id.* 832, per Bolland, B.; *R. v. Ellis*, Ry. & M. 432, per Littledale, J., citing a similar decision of Holroyd, J., and overruling *R. v. Wilson*, Holt's N. P. R. 597, per Richards, C. B.

(*m*) *R. v. Thornton*, 1 Moo. C. C. 27; *R. v. Gibney*, Jebb, C. C. 15; *R. v. Kerr*, 8 C. & P. 176. The case of *R. v. Devlin*, 2 Cawf. & Dix, C. C. 152, is contra, but seems not to be law. (*n*) *R. v. Wild*, 1 Moo. C. C. 453.

(*o*) *R. v. Wild*, 1 Moo. C. C. 452; *R. v. Thornton*, *id.* 27; *R. v. Kerr*, 8 C. & P. 179, per Park, J.; anon. per Littledale, J. cited; 1 Ph. Ev. 406. In the case of *R. v. Doyle*, 1 Cawf. & Dix, C. C. 396, a constable, after cautioning the prisoner, asked her how so much of her blue came into the child's stomach, and Bushe, C. J., is reported to have rejected the answer; but this case, it is submitted, is not law. See Joy on Confess. 32—41, 42—44.

(*p*) *R. v. Berigan*, Ir. Cir. R. 177, per Crampton, J. This case seems to overrule *R. v. Hall*, 2 Lea. C. C. 560, (*n*), per Mr. Sergt. Adair. See *R. v. Boswell*, C. & Marsh. 584, cited post, § 840.

(*q*) *R. v. Dingley*, 1 C. & Kir. 640, per Pollock, C. B.; *R. v. Barley*, 2 St. Ev. 13, n. (*z*) approved of by all the judges.

(*r*) *R. v. Simons*, 6 C. & P. 541, per Alderson, B.

(*s*) §§ 660—663, 668—670, post; *R. v. Shaw*, 6 C. & P. 373, per Patteson, J.

(*t*) *R. v. Thornton*, 1 Moo. C. C. 27; *R. v. Gibney*, Jebb, C. C. 15, 17, 18, 20; *R. v. Magill*, cited in McNally's Ev. 38; *R. v. Long*, 6 C. & P. 179, per Gurney, B.; Joy on Confess. 45—48; *R. v. Lavin*, Ir. Cir. R. 813, per Perrin, J.

§ 637. In most cases, indeed, it may be advisable and proper to caution the prisoner in general terms, that any confession he makes will be admissible against him at the trial, and can do him no service (*u*); because if it should turn out that any threat or inducement has been previously held out by some person in authority, the confession, which is unaccompanied by such caution, will, as before stated (*v*), be inadmissible. Still, it is not necessary, in general, to do more than to show that the party receiving the confession left the prisoner at full liberty to act and judge for himself; and though it should appear that immediately before the admission was made the accused was in the custody of another person, the Court, unless there be some reason to suspect collusion, will not compel the prosecutor to call such person as a witness, or to prove that he did not hold out any threat or inducement (*w*). In order, however, to free the evidence from all reasonable objection, it will be prudent, especially in important cases, to call any persons in authority, who, shortly before the confession was made, either had the prisoner in custody, or held any conversation with him (*x*). Notwithstanding the law is as above stated, many justices of the peace, both in England and Ireland, are in the habit of *dissuading* the culprit, with more or less earnestness, from disclosing any fact which may tend to establish his guilt. This practice, which is rather to be admired for romantic generosity than for wisdom, or for any beneficial consequences resulting therefrom to the public (*y*), has been very properly condemned by several able judges, as an absurd and improper mode of shutting up one of the most valuable sources of justice and truth (*z*).

§ 638. It has been thought that *illegal imprisonment* is calculated

(*u*) *R. v. Green*, 5 C. & P. 312, per Gurney, B.; *R. v. Arnold*, 8 C. & P. 622, per Lord Denman; *R. v. O'Reilly*, Ir. Cir. R. 718, per Ball, J.

(*v*) Ante, § 634.

(*w*) *R. v. Clewes*, 4 C. & P. 223, per Littleale, J.; *R. v. Swatkins*, id. 550, per Patteson, J.; *R. v. Gibney*, Jebb, C. C. 15; *R. v. Courtney*, 2 Crawf. & Dix, C. C. 63, per Ball, J.; Joy on Confess. 59—61. (*x*) See cases cited in last note.

(*y*) Edinb. Rev. March, 1824.

(*z*) *R. v. Green*, 5 C. & P. 312, per Gurney, B.; *R. v. Arnold*, 8 C. & P., 622, per Lord Denman. In *R. v. Cart*, Maidstone Sum. Ass. 1838, MS., Lord Denman observed to some constables, who were called as witnesses:—"The distinction is

to exert such influence upon the mind of the prisoner, as to justify the inference that his confessions made during its continuance were not voluntary; and on one occasion, they appear on this ground to have been rejected (*a*). But this doctrine cannot yet be considered as satisfactorily established (*b*).

§ 639. From the preceding observations and cases, it is clear that a confession, to be inadmissible, must have been made in consequence of some inducement or threat, which, being held out or sanctioned by a person in authority, related to the prisoner's escape from the charge against him. Still, the question remains, what language is sufficient to constitute such inducement or threat? and here the reported decisions certainly furnish a very unsatisfactory guide. There may be some reason for applying the rule to such words as these: "Unless you give me a more satisfactory account, I will take you before a magistrate" (*c*); "If you will tell me where my goods are, I will be favourable to you" (*d*); "I only want my money, and if you give me that, you may go to the devil" (*e*); "If you will not tell all you know about it, of course we can do nothing" (*f*); "You are under suspicion of this, and you had better tell all you know" (*g*); "The watch has been found, and if you do not tell me who your partner was, I will commit you to prison" (*h*); "You had better split, and not suffer for all of them" (*i*). But when confessions have been rejected in consequence of such expressions as the following having been used:

very clear; you are not to suppress the truth, but you are not to take any measures of your own to endeavour to extort it."

(*a*) *R. v. Ackroyd*, 1 Lew. C. C. 49, per Holroyd, J.

(*b*) *R. v. Thornton*, 1 Moo. C. C. 27; 1 Lew. C. C. 49, S. C.

(*c*) *R. v. Thompson*, 1 Lea. C. C. 291, per Hotham, B.; *R. v. Richards*, 5 C. & P. 318, per Bosanquet, J.; S. C. cited as *R. v. Griffiths*, 2 Russ. C. & M. 832; *R. v. Walsh*, Ir. Cir. R. 866, per Jackson, J.

(*d*) *R. v. Cass*, 1 Lea. C. C. 293, n. (*a*), per Gould, J.; *Boyd v. The State*, 2 Humphreys, R. 37.

(*e*) *R. v. Jones*, R. & R. 152.

(*f*) *R. v. Partridge*, 7 C. & P. 551, per Patteson, J. See also *Gnild's case*, 5 Halst. 163.

(*g*) *R. v. Kingston*, 4 C. & P. 387, per Parke and Littledale, Js.

(*h*) *R. v. Parratt*, 4 C. & P. 570, per Alderson, J.; *R. v. Upchurch*, 1 Moo. C. C. 465.

(*i*) *R. v. Thomas*, 6 C. & P. 353, per Patteson, J.

"It is of no use for you to deny it, for there are the man and boy who will swear they saw you do it" (*j*); "Now, be cautious in the answers you give me to the questions I am going to put to you about this watch" (*k*); "Do not say anything to prejudice yourself, as what you say I shall take down, and it will be used for you or against you at your trial" (*l*); "What you are charged with is a very heavy offence, and you must be very careful in making any statement to me, or any body else, that may tend to injure you; but anything you can say in your defence, we shall be ready to hear, or send to assist you" (*m*); in these, and the like cases, we cannot help observing, however much we may respect the opinions or prejudices of individual judges, that justice and common sense seem to have been sacrificed on the shrine of mercy. So anxious has the Court sometimes been to exclude evidence of confessions, that exhortations not to tell lies, but to *speak the truth*, have been deemed likely to induce a *false* acknowledgment of guilt; and, consequently, admissions made after such exhortations have more than once been rejected (*n*). This somewhat paradoxical opinion seems now, however, to be happily exploded (*o*).

§ 640. Where the inducement relates to the charge against the prisoner, and comes from a person in authority, it is *not necessary* that it should be *directly held out to the prisoner himself*; but it will equally have the effect of excluding his confession, if there be good reason to believe that it has come to his knowledge, and has influenced his conduct. Thus, where a superior clerk in the post-office said to the wife of a postman, who was in custody for opening and detaining a letter, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;"—the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated to him the substance of

(*j*) *R. v. Mills*, 6 C. & P. 146, per Gurney, B.

(*k*) *R. v. Fleming*, 1 Arm. Mac. & Ogle, 330.

(*l*) *R. v. Drew*, 8 C. & P. 140, per Coleridge, J.

(*m*) *R. v. Morton*, 2 M. & Rob. 514, per id.

(*n*) *R. v. Shepherd*, 7 C. & P. 579, per Gaselee, J.; *R. v. Enoch*, 5 C. & P. 539, per Parke, J.; *R. v. Wood*, Ir. Cir. R. 597, per Crampton, J.; *R. v. Laughner*, 2 C. & Kir. 225, per Pollock, C. B.

(*o*) *R. v. Holmes*, 1 C. & Kir. 248, per Rolfe, B.; *R. v. Court*, 7 C. & P. 486, per Littledale, J.; *R. v. Harris*, 1 Moo. C. C. 341.

this statement (*p*). So, where, in a case of murder, Government had published a handbill, offering pardon to any one of the offenders, except the person who struck the blow, who should give such information as would lead to the conviction of his accomplices; and it appeared that the prisoner was aware of this offer, and was induced by it to make a confession, the Court held that what he said could not be given in evidence (*q*).

§ 641. The rule that the confession must be voluntary, is equally applicable to cases where the prisoner has made a statement *during his examination before a magistrate*. The practice of subjecting the accused to a compulsory examination, and even of putting him to the torture, was familiar to the Roman law (*r*), and both these modes of proceeding were legal in Scotland so late as the reign of Queen Anne (*s*). In England, too, down to the reign of Charles the First, the rack was occasionally employed as an apt engine for wringing truth from the victims of the Star Chamber and the High Commission Court (*t*); and even Lord Coke, till he became a patriot, and saw political offences with the eyes of a leader of the Opposition, was prepared to wink at, if not to justify, its use (*u*); while Lord Bacon, to his eternal infamy, did not hesitate, as Attorney-General, to superintend, in person, the torture of an aged clergyman (*v*). However, in the year 1628, on the trial of Felton for the murder of the Duke of Buckingham, the evidence being amply sufficient to insure a conviction without the use of torture, and the prisoner threatening, that, were he put to the rack, he might possibly accuse Bishop Laud, or some other of the lords of the council as being accessories to the fact, the judges

(*p*) *R. v. Harding*, 1 Arm. Mac. & Ogle, 340.

(*q*) *R. v. Boswell*, C. & Marsh. 384, per Cresswell, J. See *R. v. Dingley* 1 C. & Kir. 637.

(*r*) See B. Carpzov. *Practicæ Rerum Criminal.*, Pars. III., Quæst. 113, per tot.

(*s*) The act of 7 Anne, c. 21, § 5, abolished the use of torture in Scotland. See 2 M'Donnall's *Inst. of Laws of Scotland*, 660. For instances of the application of torture beyond the Tweed, see 6 How. St. Tr. 1217—1222, and 10 id. 687, 691, 726—747, 751—758.

(*t*) *Campion's case*, cited by Weston, B., in *R. v. Cellier*, 7 How. St. Tr. 1205; *Peacham's case*, 2 How. St. Tr. 871.

(*u*) See *Lady Shrewsbury's case*, 2 How. St. Tr. 773, 774, n. (*a*).

(*v*) *Peacham's case*, 2 How. St. Tr. 870, 871, 876. See the masterly Life of Lord Bacon, in Lord Campbell's *Lives of the Chancellors*, 2nd vol., 339—341.

came to an unanimous opinion, that "no such punishment as torture by the rack was known or allowed by our law" (*w*); and since that decision no attempt has been made to revive this atrocious practice (*x*).

§ 642. Though torture was thus formally abolished before the middle of the seventeenth century, it was not till after the lapse of many years that the common law doctrine, *nemo tenetur prodere seipsum*, was duly recognised, or at least was interpreted to mean, as it does in the present day, that all confessions should be strictly *voluntary*; for no man can read the cases reported among the State Trials, without observing, that, up to a comparatively modern date, persons accused of flagrant or political offences were earnestly pressed, in their preliminary examinations, to acknowledge their guilt; while at their trial recourse was frequently had to every artifice of cross-examination, in order to entrap them into a confession, or to detect some falsehood or inconsistency in the statements which they had made in support of their innocence. This practice, which still continues in France (*y*), and in other countries on the continent of Europe, and which certainly is no mean instrument for the discovery of truth, has been regarded both in this country and in America, during the last century, as savouring of unfairness and oppression, and has consequently been discontinued; and, though certainly few Englishmen would wish to see this mode of proceeding re-established in all its harshness and vigour in our criminal courts, some will probably consider that false sentiments of humanity and fair dealing have been carried somewhat too far in an opposite direction.

§ 643. The first acts which regulated the examination of prisoners before the magistrates, were passed in the reign of Queen Mary (*z*); but the *course of practice is now defined* in England by the Act of

(*w*) *R. v. Felton*, 3 How. St. Tr. 371.

(*x*) In *R. v. Cellier*, 7 How. St. Tr. 1205, Weston, B., told the jury, that no person had suffered torture in England, since Campion, the Jesuit, who was put to the rack in the 20th year of the reign of Queen Elizabeth. But this is a strange mistake.

(*y*) See Comments on the late case of the Duc de Praslin, in *Law Rev.* No. xiii.

(*z*) 1 & 2 Ph. & M. c. 13; 2 & 3 Ph. & M. c. 10.

7 G. 4, c. 64, and in Ireland, by the corresponding Act of 9 G. 4, c. 54. Under these statutes, the principles of which have been adopted in several of the United States (z), the justice or justices, before whom any person shall be brought, charged with any felony or misdemeanor, or on suspicion of any such crimes respectively, shall, before he or they shall admit him to bail, or commit him to prison, take his examination, and put the same, or as much thereof as shall be material, into writing, and subscribe it, and deliver it, or cause it to be delivered, to the proper officer of the court in which the trial is to be, before or at the opening of the court (a). Though these acts, in prescribing the duty of coroners, contain no provision for taking the examination of the accused, but simply enact, that every coroner shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall certify and subscribe the same and deliver it to the officer of the court in which the trial is to be (b),—it seems on several occasions to have been assumed, that the coroner has the same authority to take the examination of a prisoner as a magistrate (c).

§ 644. The usual and *proper course in taking examinations* under these acts, is to wait till the depositions of the witnesses for the Crown have been reduced to writing, and then to ask the prisoner whether he wishes to say anything in answer to the charge (d); explaining to him at the same time that if his state-

(z) See New York Revised Statutes, Part 4, ch. 2, tit. 2, §§ 14, 15, 16, 26; Bellinger's case, 8 Wend. 595, 599; Elmer's Laws of New Jersey, p. 450, § 6; Laws of Alabama, (Toulmin's Digest,) tit. 17, ch. 3, § 2, p. 219; Laws of Tennessee, (Carruther's and Nicholson's Digest,) p. 426; North Carolina Rev. Stat. ch. 35, § 1; Laws of Mississippi, (Alden and Von Hoosen's Digest,) ch. 70, § 5, p. 532; Laws of Delaware, (Revised Code of 1829,) p. 63; Brevard's Laws of South Carolina, Vol. 1, p. 460; Laws of Missouri, (Revision of 1835,) p. 476; Laws of Michigan Territory, p. 215. See also Massachusetts Revised Stat., ch. 85, § 25; *Resp. v. M'Carty*, 2 Dall. 87, per M'Kean, C. J.

(a) 7 Geo. 4, c. 64, §§ 2, 3, & 6; 9 Geo. 4, c. 54, §§ 2, 3, & 6, Ir. By these acts, two justices are necessary, in order to admit to bail any person taken on a charge of felony, or suspicion of felony; and both must, as it seems, subscribe the examination. (b) 7 Geo. 4, c. 64, §§ 4 & 6; 9 Geo. 4, c. 54, §§ 4 & 6, Ir.

(c) *R. v. Reed*, M. & M. 403, cor. Tindal, C. J.; *R. v. Roche*, C. & Marsh. 341, cor. Lord Denman; *Brogan's case*, 2 Russ. C. & M. 874, 887, cor. Lord Lyndhurst.

(d) *R. v. Fagg*, 4 C. & P. 566, per Garrow, B.

ment should be in the nature of a confession, it will not operate in his favour, but will be used as evidence against him at his trial (*e*). The examination, however, will not be rejected, though it be taken before the evidence against the prisoner is concluded, or though some of the witnesses have given their testimony in the prisoner's absence (*f*), or though the accused has not been warned as to the consequences of any confession (*g*). The precise words used by the prisoner should be taken down in the first person; for although the mere fact of the statement being reduced to writing in the third person would probably not be fatal to its admission (*h*), the Court would not allow it to be read, if it were clearly expressed in language, which the prisoner would not have used (*i*). The jury are to judge of the effect of the statement, and in order to perform this duty in a satisfactory manner, they should obviously have before them the very words in which it has been made (*j*). The examination, when written, must, in accordance with the mandatory language of the acts, be subscribed by the justice or justices, or certified and subscribed by the coroner, taking it (*k*); and with the view of giving additional facilities to its future proof, and of clearing up all doubts respecting its accuracy, the judges seem to require, though the statutes are silent on the subject, that the examination should be read over to the prisoner, and should be tendered to him for his signature (*l*). If, on this course being pursued, the accused signs the paper, or if declining to put his name or mark to it, he admits its correctness (*m*), it may then be

(*e*) *R. v. Green*, 5 C. & P. 312, per Gurney, B.; *R. v. Arnold*, 8 id. 621, per Lord Denman.

(*f*) *R. v. Bell*, 5 C. & P. 162, per Gaselee, J., after consulting Lord Tenterden, and overruling a dictum of Garrow, B., in *R. v. Fagg*, 4 C. & P. 566, "that nothing which a prisoner stated, before he knew what the evidence against him was, ought to be used to criminate him."

(*g*) Ante, § 636.

(*h*) *R. v. Roche*, C. & Marsh. 341, per Lord Denman.

(*i*) *R. v. Sexton*, per Best, J., and *R. v. Mallet*, per Dallas, C. J., both cited in 2 Russ. C. & M. 867.

(*j*) See ante, §§ 622, 623.

(*k*) In *R. v. Lambe*, 2 Lea. C. C. 552, the examination admitted was not signed by the magistrate; but that case was decided on the old acts of Ph. & Mary, which did not require the subscription of the justice.

(*l*) 2 Russ. C. & M. 881, 882.

(*m*) *R. v. Lambe*, 2 Lea. C. C. 552; *R. v. Thomas*, id. 637; *R. v. Daniel*, per Bosanquet, J., cited 2 Russ. C. & M. 882.

read against him at the trial, as a statutory examination; but if, on the other hand, he will neither sign it, nor acknowledge that it is true, it cannot be received as evidence *per se* (*m*), though it may be used to refresh the memory of the person who wrote it (*n*). It seems to be further necessary to the validity of an examination as evidence *per se*, that it should appear on the face of the document, that it was taken while the prisoner was under examination on a charge of felony or misdemeanor, or of suspicion of one of these crimes, and that the justices subscribing it were then acting as justices pursuant to statute (*o*). But these facts need not appear by a separate caption, at least, if the examination be written on the same paper with the depositions; for in such case, the heading at the commencement of the document will apply to all the statements contained therein (*p*). In this respect the rule of law differs from that which governs examinations taken under the poor-law acts (*q*).

§ 645. In order to *prove a written examination*, which has been taken in conformity with the act, it is not necessary, as was formerly supposed (*r*), to call either the magistrate or his clerk, unless the document contains erasures or interlineations, which require explanation (*s*). In serious cases, indeed, it is advisable, as a matter of caution, to produce one or other of these officers, so that it may clearly appear that the proceedings have been

(*m*) *R. v. Foster*, 1 Lew. C. C. 46, per Hullock, B.; *R. v. Hirst*, *id.*, per Bayley, J.; *R. v. Telicote*, 2 Stark. R. 483, per Wood, B.; *R. v. Sykes and R. v. Wilson*, both per Littledale, J., cited 2 Russ. C. & M. 882; *R. v. Pressly*, 6 C. & P. 183, per Patteson, J.

(*n*) *R. v. Dewhurst*, 1 Lew. C. C. 47, per Bayley, J.; *R. v. Hirst*, *id.*, per *id.*; *R. v. Jones*, *id.* note, per Bayley and Gaselee, Js., and Vaughan, B.; 7 C. & P. 239, n. (*a*), S. C.; *R. v. Pressly*, 6 C. & P. 183, per Patteson, J.

(*o*) *R. v. Tarrant*, 6 C. & P. 182, per Patteson, J.

(*p*) *R. v. Johnson*, 2 C. & Kir. 355, per Alderson, B.

(*q*) *R. v. Ratcliffe Culey*, 2 Sess. Cas. 352.

(*r*) 2 Hale, P. C. 52, 284; *R. v. Richards*, 1 M. & Rob. 396, n., per Patteson, J.; *R. v. Smith*, 2 Lew. C. C. 139; *R. v. Chappell*, 1 M. & Rob. 395, per Lord Denman.

(*s*) *R. v. Brogan*, cited 2 Russ. C. & M. 887, per Lord Lyndhurst; *R. v. Dwyers*, cited *id.*, n. (*p*).

conducted in a proper manner (*t*); but even on the trial of a prisoner for a capital offence, the adoption of this course is not compulsory, but the writing will in strictness be admissible, on proof of the signature of the justice and the signature or mark of the prisoner (*u*). If the prisoner has not signed his name to the document, or attached his mark to it, some witness, who was present at the inquiry, must be called to speak to its identity, and to prove that it was read over to the accused, and was assented to by him (*v*). The identity of the examination may easily be established, if it be written, as it ought to be, on the same paper as the depositions of the witnesses (*w*). In all these cases, the law presumes that the justices have done their duty, and have delivered to the Court examinations which contain the real statements of the prisoners.

§ 646. This presumption, while it facilitates the proof of the examination as returned, precludes the production of any evidence tending to *contradict or vary* the statements it contains. Thus, where, in the depositions returned by the magistrates, the prisoner was stated to have said, "I decline to say anything," a witness was not allowed to prove a confession, which he declared the prisoner had made in the magistrate's presence while under examination (*x*); and where the clerk to the justices, in taking down the statements of three prisoners, had left blanks whenever either of them had mentioned the names of the others, the counsel for the Crown was not permitted to supply these blanks by producing supplementary parol evidence (*y*). Whether this presumption is of so conclusive a character, as to exclude all parol evidence which is tendered with the view of *adding* to the written examination, is a

(*t*) *R. v. Pikesley*, 9 C. & P. 124, per Parke, B.; *R. v. Wilshaw*, C. & Marsh. 145, per Coltman, J.

(*u*) Cases cited in last note; *R. v. Foster*, 7 C. & P. 148, per Alderson, B., and Bosanquet, J.; *R. v. Priestley*, 1 Lew. C. C. 74, per Parke, J.; *R. v. Rees*, 7 C. & P. 568, per Lord Denman.

(*v*) *R. v. Reading*, 7 C. & P. 649, per Parke, B.; *R. v. Hearn*, C. & Marsh. 109, per Coltman, J.; *R. v. Hopes*, 7 C. & P. 136, per Vaughan and Patteson, Js.; 1 M. & Rob. 396, n. S. C.; *R. v. Haines*, 2 Russ. C. & M. 886, per Bolland, B.

(*w*) See *R. v. Hearn*, C. & Marsh. 109. See ante, § 644, ad fin.

(*x*) *R. v. Walter*, 7 C. & P. 267, per Lord Abinger.

(*y*) *R. v. Morse*, 8 C. & P. 605, per Patteson, J.

question of doubt and difficulty: though the better opinion seems to be, that, provided such evidence be precise and distinct, and be not repugnant to the examination returned, it will be admissible (r). The statutes, as we have seen (w), require that the magistrate should reduce to writing the examination, "or as much thereof as shall be material;" but as the question of materiality is one which is necessarily indefinite, and respecting which opinions may differ widely,—and as a justice may, consequently, consider a statement immaterial, which the prosecutor may deem of serious importance,—there seems nothing unreasonable in the proposition, that the latter should be at liberty to supply by parol testimony any omission in the examination returned. The written examination taken pursuant to the statute, is no doubt the *best* evidence so far as it goes; and therefore, as to the matters which it contains, it is the only legitimate medium of proof (x); but to hold that it is negatively, as well as affirmatively, conclusive, and that it contains the whole truth, as well as nothing but the truth, is to strain beyond all just limits the rule excluding parol evidence to contradict or vary written instruments (y); and such a doctrine, in fact, renders the rights of the public, and the administration of justice, liable to be controlled and defeated by the very fallible discretion of a country magistrate. The legislature, in directing the examination of prisoners to be taken by the justice, had no intention whatsoever, as the judges themselves have declared, to alter the nature of evidence, or to prevent that testimony from being received against the prisoner, which before the passing of the acts was admissible at common law (z).

§ 647. In conformity with these views, Lord Chief Justice Best has expressed his opinion "that, upon clear and satisfactory evidence, it will be admissible to prove something said by a prisoner, *beyond* what was taken down by a magistrate (a);" and the

(v) See Joy on Confess. 89—92; 2 Russ. C. & M. 876—878.

(w) Ante, § 643.

(x) R. v. Reason, 16 How. St. Tr. 35, per Eyre, J.

(y) As to which, see post, Chapter xviii.

(z) R. v. Lambe, 2 Lea. C. C. 558, per Grose, J., pronouncing the opinion of the judges. His Lordship's observations are directed to the acts of Philip & Mary, but they equally apply to those passed in the reign of George the Fourth.

(a) Rowland v. Ashby, Ry. & M. 232.

case of Harris, Evans, and Butler, decided by all the judges, is a leading authority to the same effect (*b*). The case is indifferently reported, but its substance is as follows:—The three prisoners had all been charged at one time before a magistrate with stealing three sheep, respectively belonging to Bennett, Pennell, and Price. On their trial for stealing Bennett's sheep, the magistrate stated that the examinations, which were signed by himself and the prisoners, were written by him; that they contained all that was taken down; that he took down everything said by each of the prisoners that he heard; and that the informations were taken as to the three sheep, before Evans and Harris were examined; and he added, that the papers produced contained everything, as he believed, which transpired before him; that he intended to take down all that was said to him, and he believed he did; and that the room was very full. These papers were the depositions of Bennett, Pennell, and Price, as to the stealing of their respective sheep, and the examinations of the prisoners. Butler had confessed each offence. The following are in substance the statements of Harris and Evans as returned. "Harris says that he was concerned in stealing Pennell's sheep." "Evans says that he did not kill the sheep, but that he helped to carry it away." Two witnesses were then called, who proved that Harris and Evans had also confessed to the magistrate, that they had been concerned in taking Bennett's sheep; and the prisoners being found guilty on this evidence, the judges unanimously held that the conviction was right, as the parol evidence, being precise and distinct, was properly received. It has been argued, that the word "distinct" here used, means "distinct from the examination produced;" and "distinct from the offence therein mentioned (*c*);" but this seems to be a forced interpretation, and is scarcely consistent with the language of the report. It is also stated that Mr. Justice Littledale, on one occasion, rejected evidence of additional statements beyond what were included in the prisoner's written examination (*d*); but as the circumstances of that case are not reported, it is idle to speculate on the grounds of the decision.

(*b*) R. v. Harris, 1 Moo. C. C. 338.

(*c*) 2 Ph. Ev. 84, 85, note.

(*d*) R. v. Mulvey, cited 2 Ph. Ev. 83.

§ 648. If parol evidence of such additional statements be admissible on the part of the prosecution, as we submit it is, the prisoner, *a fortiori*, would seem entitled to pray it in aid of his defence; and this view of the law is sanctioned, not only by the case of *Venafra v. Johnson* (e), but also by the authority of Mr. Starkie and Mr. Phillipps; the latter of whom, while he denies the right of the Crown, admits the right of the accused, to produce such evidence (f). Whatever may be the correct rule upon this particular point, it appears to be clear, that a written examination will not exclude parol evidence, either of an extra-judicial confession previously or subsequently made (g); or of a statement made before the justice on a former investigation, and not incorporated in the examination returned (h); or of anything incidentally said by the prisoner while the witnesses were deposing against him, even though it were addressed to the magistrate himself, provided it were not taken down by him or his clerk, and did not form part of the strict judicial inquiry (i). So, if it can be proved that the prisoner's examination was not reduced to writing, parol evidence of what he said before the magistrates will be received (j); though the presumption that all things were done as the law requires, renders it necessary for the Crown to give clear evidence on this point (k); and on more than one occasion, the Judges seem to have thought it necessary that the magistrate or his clerk should be called to prove the negative fact (l). Again, if the written examination be shown to have been lost (m), or if it be wholly

(e) 1 M. & Rob. 316, per Gaselee, J., after consulting the judges of the Com. Pl.
(f) 2 Ph. Ev. 82—86; 3 St. Ev. 787.

(g) *R. v. Carty*, Ridgway's R. 73, cited by Joy on Confess. 97, and *McNally* on Ev. 45; *R. v. Reason*, 16 How. St. Tr. 35, per Eyre, J.

(h) *R. v. Wilkinson*, 8 C. & P. 662, per Littledale, J., and Parke, B.

(i) *R. v. Spilsbury*, 7 C. & P. 187, per Coleridge, J.; *R. v. Johnson*, per Parke, B.; *R. v. Moore*, per id.; *R. v. Hooper*, per Erskine, J.; all cited in 2 Russ. C. & M. 879. But see *R. v. Weller*, 2 C. & Kir. 223, per Platt, B. Sed qu. as to this case.

(j) *R. v. Hall*, cited by Grose, J., in *R. v. Lambe*, 2 Lea. C. C. 559; *R. v. Huet*, 2 Lea. C. C. 821.

(k) *R. v. Fearshire*, 1 Lea. C. C. 202; *R. v. Jacobs*, id. 309; *R. v. Hinxman*, per Ashurst, J., and *R. v. Fisher*, per Heath, J., cited id. 310, 311, note.

(l) *R. v. Packer*, per Parke, J., and *R. v. Phillips*, per Bosanquet, J., both cited in 2 Russ. C. & M. 876, note (p); *Phillips v. Wimburn*, 4 C. & P. 273, per Tindal, C. J.

(m) *R. v. Reason*, 16 How. St. Tr. 35, per Eyre, J.

inadmissible by reason of irregularity, parol evidence will be received, to prove what the prisoner voluntarily disclosed (*n*); and in this last event of the examination being rejected for informality, it may still be used as a cotemporaneous writing, to refresh the memory of the witness who wrote it (*o*).

§ 649. There is, however, one species of irregularity, which, in excluding the examination as evidence per se, prevents its being used to refresh the writer's memory, and shuts out all parol testimony of what was said on the same occasion. We allude to the case where the *examination purports* to have been *taken upon oath* (*p*). This rule, which is supported by too many authorities to admit of dispute, rests upon two principles of law, both of which are of very questionable policy, as applied to the particular case under discussion. The first is a principle which has been several times mentioned above, namely, that the confession of a prisoner must be voluntary; and it is contended, that a statement made under oath is not so. This is certainly true in one sense, though not in that in which it is used by the advocates for exclusion. A confession not voluntary is excluded. Why? because it may be untrue. A confession made upon oath cannot be rejected on this ground; since it is absurd to contend, that an oath, which in all other cases is rightly considered as the most effectual test of truth, should, if taken by a prisoner, be regarded as an inducement to falsehood. But then it is urged, *nemo tenetur prodere seipsum*; a prisoner should not be compelled to criminate himself. Admitted; but what then? A prisoner, though sworn, is no more bound to criminate himself, than if he were simply interrogated without any oath being administered to him. He has still full liberty to

(*n*) *R. v. Reed*, M. & M. 403, per Tindal, C. J.

(*o*) *R. v. Layer*, 16 How. St. Tr. 214, 215, per Pratt, C. J.; *R. v. Watkins*, per Bosanquet, J., cited n. (*b*), 4 C. & P. 550; *R. v. Tarrant*, 6 C. & P. 182, per Patteson, J.; *R. v. Pressly*, id. 183, per id.; *R. v. Dewhurst*, and *R. v. Hirst*, per Bayley, J., 1 Lew. C. C. 47; *R. v. Jones*, Carr. Suppl. 13, per Bayley and Gaselee J., and Vaughan, B., 1 Lew. C. C. 47, n.; 4 C. & P. 550, n., S. C.; *R. v. Bell*, 5 C. & P. 162, per Gaselee J., and Lord Tenterden.

(*p*) *R. v. Smith*, 1 Stark. R. 242, per Le Blanc, J.; *R. v. Davis*, 6 C. & P. 177, per Gurney, B.; *R. v. Bentley*, id. 148, per id.; *R. v. Rivers*, 7 C. & P. 177, per Park, J.; *R. v. Owen*, 9 C. & P. 238, per Gurney, B.; *R. v. Pikesley*, id. 124, per Parke, B., and Bosanquet, J.; *R. v. Wheeley*, 8 C. & P. 250, per Alderson, B.

decline to make any explanation or declaration whatever; though if he does consent to answer the questions put to him, he may, perhaps, incur the penalties of perjury should he knowingly utter what is false (*q*). "But a friendless accused is not aware of the law in his favour." This may be so; but in what other case is a party at liberty to set up his ignorance of the law? If the maxim of the common law, *ignorantia legis neminem excusat*, be sound, as it unquestionably is; and if, consequently, the defence of acting in ignorance cannot protect an offender even from punishment; on what principle of justice is the accused entitled to say, "It is true I have confessed my crime, and have sworn that my statement is true; but you, the jury, must not hear what I said, because I was not aware of the existence of a rule of law which would have expressly justified me in holding my peace?" If the practice of examining prisoners on oath be deemed inquisitorial and harsh, let it be discountenanced, not by rejecting a confession so obtained, but by prohibiting justices from acting in this manner, or even by rendering them liable to a penalty in case of disobedience.

§ 650. It may be thought, at first view, that if this change were effected, the practical result would be the same; but this is not so; since, at present, not only are all confessions made upon oath rejected, but all those *which purport to be so made* (*r*); and this leads us to the second principle of law, on which the rule under discussion rests. That principle is, that as the justices, in discharge of their duty, ought to make a true return of what took place before them, the Court will presume that they have *done so*; and, therefore, will not admit parol evidence to vary or contradict the written document so returned. Now the fallacy of this reasoning is obvious. In the first place, the presumption, *omnia ritè esse acta*, is not conclusive in ordinary cases, and should not be so in this; and next, even supposing that it should, it does not apply. The duty of the justice is two-fold; first, to examine the prisoner without administering an oath

(*q*) This however seems doubtful, as the magistrate has no authority to administer such an oath.

(*r*) See cases cited ante, § 649, note (*p*).

to him (s); and, secondly, to make a true return of any statement he makes. If, then, an examination be returned, which purports to have been taken on oath, the presumption that this return is true is at least counterbalanced by the opposite presumption, that the justice has discharged his duty by not swearing the prisoner; and the result is, that parol evidence should be received, in order to ascertain which presumption is in accordance with the fact. The principle, that written documents shall not be varied or contradicted by parol testimony, may apply to the body of the examination, which is taken down by the justice or his clerk, and is expressly assented to by the accused; but it should not extend to the mere formal heading or conclusion of the examination, which is not, or at least need not be, read over to the prisoner, or admitted to be correct by him; and a mis-statement in which may, and in fact notoriously does, often arise from the inadvertence or carelessness of the magistrate or his clerk. If the justice were liable to a penalty, as above suggested, for taking a prisoner's confession on oath, he would clearly be entitled, if sued or prosecuted for such penalty, to show that, though the examination purported on its face to have been taken on oath, the prisoner was not in fact sworn; and no real danger could be apprehended, but, on the contrary, much benefit would accrue to the administration of criminal justice, if a similar course of proceeding were allowed, when the question was whether a confession was receivable or not. However, as before stated, the authorities in favour of rejecting examinations which purport to be upon oath, are so numerous and consistent, that, without the aid of the legislature, little hope can be entertained that a more satisfactory rule will be adopted in practice (t).

§ 651. Though the prisoner must not be sworn, yet where, being mistaken for a witness, an oath was administered to him, but, the mistake being discovered, the deposition was destroyed,—it was held that a subsequent statement made by him, after due caution from the magistrate, was clearly admissible (u). And, indeed, the

(s) B. N. P. 242.

(t) See cases cited ante, § 649, note (p). See also No. 57 of Law Mag. 13—19, where the anomalies in the present law of confessions are amusingly exposed.

(u) R. v. Webb, 4 C. & P. 564, per Garrow, B.

rule excluding sworn confessions seems strictly confined, at common law, to the case of a statement made by the party upon oath, while *a prisoner under examination* respecting the criminal charge (r). It is true that one or two decisions by Mr. Baron Gurney might be cited, which seem to extend the rule somewhat further, and to render confessions inadmissible, which have been made on oath to magistrates or coroners by parties, who, after being examined as *witnesses*, have themselves been committed for trial (w); but the authority of these decisions has been much shaken by subsequent cases, and they cannot be now safely relied upon as law.

§ 652. Thus, it has recently been held by the judges, that, on an indictment for forging a bill of exchange, depositions of the prisoner, which had been taken on oath before commissioners of bankruptcy, *after* the prisoner had been charged before the mayor with forging the bill, were admissible against him (x); and so also on the trial of an indictment for conspiracy, the answers in Chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, have been received (y). An affidavit, too, has been given in evidence against a prisoner, which was sworn by him in a suit in Doctors' Commons (z); and depositions made by prisoners, when examined as witnesses against other persons on criminal charges, have several times been admitted (a). So, the testimony, given by a prisoner before a committee of the House of Commons, has been read against him on a criminal trial (b); though this case is of little authority on the subject under discussion, as the testimony could not have been given on oath (c). The case of *R. v. Britton* (d), which is sometimes cited as a decision conflicting with the above proposition, is in fact no

(r) See Joy on Confess. 62—68.

(w) *R. v. Lewis*, 6 C. & P. 161, per Gurney, B.; *R. v. Davis*, id. 177, per id.; *R. v. Owen*, 9 C. & P. 83, per id.; and see note (w) in 2 Russ. C. & M. 860.

(x) *R. v. Wheeler*, 2 Moo. C. C. 45; 2 Lew. C. C. 167, S. C.

(y) *R. v. Goldshede*, 1 C. & Kir. 657, per Lord Denman; *R. v. Highfield*, per Vaughan, B., cited 2 Russ. C. & M. 859.

(z) *R. v. Walker*, per Lord Ellenborough, cited by Gurney, B., in 6 C. & P. 162.

(a) *R. v. Haworth*, 4 C. & P. 254, per Parke, J.; *R. v. Tubby*, 5 C. & P. 530, per Vaughan, B.

(b) *R. v. Mercer*, 2 Stark. R. 366, per Abbott, J.

(c) See per Lord Tenterden in *R. v. Gilham*, 1 Moo. C. C. 203.

(d) 1 M. & Rob. 297, per Patteson and Alderson, Js.

hostile authority, as the only question there determined was, that on an indictment against a bankrupt for not disclosing his effects under the commission, his balance-sheet, which was only admissible in the event of there being a valid commission, could not be given in evidence to prove the petitioning creditor's debt, as a part of the commission (*d*). On the whole it seems clear, that if a prisoner, on being examined as a witness, has consented to answer questions, to which he might have demurred as tending to criminate himself, and which, therefore, he was not bound to answer, his statement will be deemed voluntary, and, as such, may be subsequently used against himself for all purposes, unless he be protected by the special language of some statute.

§ 653. The Act of 9 Geo. 4, c. 54, § 2, affords an example of such a protection in the sister kingdom; for that Act, after empowering Irish justices to summon and examine witnesses touching any felony, or suspicion of felony, with which any person shall be charged before them, provides, "that no such examination shall subject the party examined to any prosecution or penalty, or be *given in evidence against* such party, save on any indictment for having committed wilful and corrupt perjury in such examination." The English Larceny and Embezzlement Act (*e*) may also be cited, as providing by § 52, "that no banker, merchant, broker, factor, attorney, or other agent, shall be liable to be convicted *by any evidence whatever* as an offender against that Act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act *on oath*, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been bonâ fide instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

§ 654. The object of all the care which is taken to exclude confessions that are not voluntary, is, as we have seen (*f*), to exclude testimony not probably true. But where, *in consequence of*

(*d*) Per Patterson, J., explaining that decision in *R. v. Wheater*, 2 Moo. C. C. 51.

(*e*) 7 & 8 Geo. 4, c. 29, § 52.

(*f*) See ante, §§ 630, 631.

information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact, is discovered, it is competent to show, that such discovery was made conformably with the information so obtained. The statement by the prisoner as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there (g). Lord Eldon, indeed, has laid down the rule somewhat more strictly, saying, in Harvey's case (h), that, where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it. But the sounder doctrine seems to be, that so much of the confession as relates *distinctly* to the fact discovered by it may be given in evidence, as this part at least of the statement is proved to have been true (i).

§ 655. If the *prisoner himself produces the goods stolen* and delivers them up to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess held out by the latter, there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery, and explanatory of its character and design, though they may amount to a confession of guilt (j). But whatever he may have said at the same time, not

(g) 1 Ph. Ev. 411; R. v. Warickshall, 1 Lea. C. C. 263; R. v. Mosey, id. 265, n., per Buller, J., and Perryn, B.; R. v. Lockhart, id. 386; R. v. Gould, 9 C. & P. 364, per Tindal, C. J., and Parke, B.; R. v. Thurtell, cited Joy on Confess. 84; R. v. Cain, 1 Cr. & Dix, C. C. 37, per Torrens, J.; Com. v. Knapp, 9 Pick. 496, 511.

(h) 2 East, P. C. 658.

(i) R. v. Butcher, 1 Lea. C. C. 265, n.; and see the cases cited in note (g), ante.

(j) R. v. Griffin, R. & Ry. 151; R. v. Jones, id. 152.

qualifying or explaining the act of delivery, is to be rejected. And if, in consequence of the confession of the prisoner thus improperly induced, and of the information by him given, *the search* for the property or person in question *proves wholly ineffectual*, no proof of either will be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon; and the acts and information of the prisoner, under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession, may also produce groundless conduct (*k*).

§ 656. As to the prisoner's liability to be affected by the *confessions of his accomplices*, it may be laid down as a general rule of law, that such confessions are not admissible against him (*l*). So strictly has this rule been enforced, that where the prisoner was indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft, was held by all the judges to be no evidence of that fact as against the receiver (*m*); and the decision, it seems, would be the same, if both parties were indicted together, and the principal were to plead guilty (*n*).

§ 657. The same doctrine prevails in cases of *agency*. In general, no person is answerable criminally for the acts of his servants or agents, whether he be the prosecutor or the accused, unless a criminal design is brought home to him. The act of the agent or servant may be shown in evidence, as proof that such an act was so done; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the principal may be

(*k*) *R. v. Jenkins*, R. & Ry. 492.

(*l*) So is the Roman law. "Confessio unius non probat in præjudicium alterius, quia aliàs esset in manu confitentis dicere quod vellet, et sic jus alteri quæsitum auferre, quando omninò jura prohibent; etiãsi talis confitens esset omni exceptione major. Sed limitabis, quando inter partes convenit parere confessioni et dicto unius alterius." Mascard. de Prob. Concl. 486, vol. 1, p. 409. See ante, § 405.

(*m*) *R. v. Turner*, 1 Moo. C. C. 347.

(*n*) *Id.* 348, citing an anonymous decision of Wood, B.

affected by the fact, when so established. For though the act of the agent may involve his principal civilly, it cannot convict him of a crime, unless it be further shown that the principal has directed, or, at least, assented to such act (*g*). Where it was proposed to show that an agent of the prosecutor, not called as a witness, had offered a bribe to a witness, who also was not called, the evidence was held inadmissible; though the general doctrine, as above stated, was recognised (*r*). To the rule thus generally laid down, there is an apparent exception in the case of the proprietor of a newspaper, who is, *prima facie*, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge. But Lord Tenterden considered this case as falling strictly within the principle of the rule; for "surely," said he, "a person who derives profit from, and furnishes means for carrying on, the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was individually concerned in the particular publication" (*s*). Yet even here the defendant may prove, if he can, that the publication was made by his servant without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part (*t*).

§ 658. It remains only to be observed, that confessions, like admissions, may be inferred from the *conduct* of the prisoner, and from his *silent acquiescence* in the statements of others, made in his presence, respecting himself (*u*); provided they were not made either before a magistrate, when the prisoner, from a sense of decorum, might have felt himself restrained from interposing, or under any other circumstances, which would naturally have prevented him from replying (*v*).

(*g*) Lord Melville's case, 29 How. St. Tr. 764; The Queen's case, 2 B. & B. 306, 307; ante, § 509. (*r*) The Queen's case, 2 B. & B. 302, 306—309.

(*s*) R. v. Gutch, M. & M. 433, 437. See further as to the acts of agents, ante, § 93. (*t*) 6 & 7 Vict. c. 96, § 7.

(*u*) R. v. Bartlett, 7 C. & P. 832, per Bolland, B.; R. v. Smithies, 5 C. & P. 332, per Gaselee and Parke, Js.; ante, §§ 574—581.

(*v*) R. v. Appleby, 3 Stark. R. 33, per Holroyd, J.; Melen. v. Andrews, M. & M. 336, per Parke, B.; Joy on Confess. 77—80; ante, § 579.

CHAPTER XVI.

OF EVIDENCE EXCLUDED ON GROUNDS OF PUBLIC POLICY.

§ 659. THERE are some kinds of evidence which the law *excludes* or dispenses with, *on grounds of public policy*; because it is thought that greater mischiefs would probably result from requiring or permitting their admission, than from wholly rejecting them. This rule of law has respect, in some cases, to the person testifying, and, in others, to the matter concerning which he is interrogated; thus referring, on the one hand, to the testimony of a party to the suit, and of the husband or wife of a party; and, on the other, to *professional communications, awards, secrets of State*, and some other species of proof of a cognate character. The former branch of this rule, as relating more properly to the Competency of Witnesses, will hereafter be treated under that head. The latter we shall now proceed briefly to consider.

§ 660. In the first place, as regards *professional communications*, the rule is now well settled, that, where a *barrister, solicitor, or attorney*, is professionally employed by a client, all communications which pass between them in the course and for the purpose of that employment, are so far privileged, that the legal adviser, whether he be called as a witness, or be made a defendant in equity on a bill of discovery being filed against him, cannot be permitted to disclose them, whether they be in the form of title-deeds, wills (*a*), documents, or other papers delivered, or statements made, to him, or of letters, statements, or entries made by him, in that capacity (*b*).

(*a*) *Doe v. James*, 2 M. & Rob. 47. There the attorney of a party claiming as devisee under a will, was not allowed to produce it, though it was suggested that the will related also to personalty, and ought therefore to be deposited in the Ecclesiastical Court, and to be open for public inspection.

(*b*) *Herring v. Cloberry*, 1 Phill. 91, 96; *Cromack v. Heathcote*, 2 B. & B. 4; *Greenough v. Gaskell*, 1 My. & K. 101. *Brougham*, L. Ch., was assisted in this last decision, by consultation with Lord Lyndhurst, Tindal, C. J., and Parke, J., 4 B. & Ad. 876; and the case is mentioned by Lord Abinger, as one in which all the authorities had been reviewed, 2 M. & W. 100.

§ 661. This rule equally applies, though the attorney be employed in the character, either of a scrivener to raise money (c), or of a conveyancer to draw deeds of conveyance (d); or though the conversation relate only to the sale of an estate, and to the amount of the bidding to be reserved (e). In fact it extends to all communications between a solicitor and his client, relating to matters within the ordinary scope of a solicitor's duty (f). It seems, also, that the legal adviser cannot be asked whether the conference between him and his client was for a lawful or an unlawful purpose (g); though, if from independent evidence it should clearly appear that the communication was made by the client for a criminal purpose, as, for instance, if the attorney was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence, it is submitted that, on the broad principles of penal justice, the attorney would be bound to disclose such guilty project (h).

§ 662. Where the *professional adviser is the party interrogated*, it is quite immaterial whether the communication relate to any litigation commenced or anticipated (i); for as Lord Chancellor Brougham observed, in a case of high authority, "If the privilege

(c) *Turquand v. Knight*, 2 M. & W. 100, per Lord Abinger; *Harvey v. Clayton*, 2 Swanst. 221, n.; *Anon.*, Skinn. 404, per Lord Holt. But here it is necessary that the attorney should have been consulted as the party's own solicitor, *R. v. Farley*, 2 C. & Kir. 313, 318. See post, § 670, ad fin.

(d) *Cromack v. Heathcote*, 2 B. & B. 4.

(e) *Carpmael v. Powis*, 1 Phill. 687. (f) *Id.* 692, per Lord Lyndhurst.

(g) *Doe v. Harris*, 5 C. & P. 594, per Parke, J.

(h) See *R. v. Farley*, 2 C. & Kir. 313; and *R. v. Avery*, 8 C. & P. 596. In *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1229, Serjt. Tindall, in argument, lays down the rule thus: "If the witness is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. For this reason, I apprehend that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client." Two of the learned judges, who tried that remarkable case, Bowes, C. B., and Mounteney, B., expressed the same sentiments, see pp. 1240—1243. See post, § 674.

(i) *Lord Walsingham v. Goodricke*, 3 Hare, 124; *Desborough v. Rawlins*, 3 My. & Cr. 515; *Sawyer v. Birchmore*, 3 My. & K. 572; *Herring v. Cloberry*,

were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions, as might eventually render any proceedings successful, or all proceedings superfluous" (*j*); and again, "This protection is not qualified by any reference to proceedings pending or in contemplation. If touching matters that come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity, either from a client, or on his account and for his benefit in the transaction of his business,—or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client,—they are not only justified in withholding such matters, but *bound to withhold* them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness" (*k*).

§ 663. "The *foundation* of this rule," adds his Lordship, "is not on account of any particular importance, which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings" (*l*). If such communications were not protected, no man, as the same learned judge remarked in another case, would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a court, either to obtain redress, or to defend himself (*m*).

1 Phill. 91; Jones v. Pugh, id. 96; Greenough v. Gaskell, 1 My. & K. 98; Carmichael v. Powis, 9 Beav. 16, 20, per Lord Langdale. These cases overrule Williams v. Mudie, 1 C. & P. 158; Ry. & M. 34, S. C.; Clark v. Clark, 1 M. & Rob. 3; Broad v. Pitt, M. & M. 233; 3 C. & P. 518, S. C.; and Wadsworth v. Hamshaw, 2 B. & B. 5, note.

(*j*) Greenough v. Gaskell, 1 My. & K. 103.

(*k*) Id. 101, 102.

(*l*) Id. 103.

(*m*) Bolton v. Corp. of Liverpool, 1 My. & K. 94, 95. "This rule seems to be

§ 664. Such being the reasons on which the rule is founded, its application has been confined, with perhaps questionable strictness, to communications which pass between a client and his legal adviser; and the protection has not been permitted to extend to any matters communicated to other persons, though such communications were made under terms of the closest secrecy. Thus, *clergymen*(*m*) and *medical men*(*n*) are bound to disclose any information, which by acting in their professional character they have

correlative with that which governs the summary jurisdiction of the courts over attornies. In *Ex parte Aitken*, (4 B. & A. 49. See also *Ex parte Yeatman*, 4 Dowl. 309,) that rule is laid down thus:—"Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." So, where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure." Per Alderson, B., in *Turquand v. Knight*, 2 M. & W. 101. The Roman law rejected the evidence of the procurator and the advocate, in nearly the same cases as the common law; but not for the same reasons; the latter regarding the general interest of the community, as stated in the text, while the former seems to have considered such testimony as not credible, because of the identity of the legal adviser's interest, opinions, and prejudices with those of his client. *Mascard. de Probat.* vol. 1, Concl. 66, vol. 3, Concl. 1239; *P. Farinacii Opera*, tom. 2, tit. 6, Quæst. 60, Illat. 5, 6.

(*m*) *R. v. Gilham*, 1 Moo. C. C. 186.

(*n*) *Duchess of Kingston's case*, 11 Harg. St. Tr. 243; 20 How. St. Tr. 572, S.C.; *R. v. Gibbons*, 1 C. & P. 97; *Broad v. Pitt*, 3 id. 519, per Best, C. J.; *M. & M. 234*, S. C. In *Wilson v. Rastall*, 4 T. R. 760, Buller, J., said, that it was much to be lamented that the law of privilege was not extended to those cases in which medical persons acquired information by attending in their professional characters; and in *Greenough v. Gaskell*, 1 My. & K. 103, Lord Brougham, while stating that the rule is limited to legal advisers, observes, that "certainly it may not be very easy to discover why a like privilege has been refused to others, especially to medical advisers." By the Revised Stat. of New York, vol. 2, p. 406, § 73, and of Missouri, Revised Code of 1835, p. 623, § 17, "No person, duly authorised to practise physic or surgery, shall be allowed to disclose any information, which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient, as a physician, or to do any act for him, as a surgeon." Though the statute is thus express, it seems that the party himself may waive the privilege, *Johnson v. Johnson*, 14 Wend. 637. A consultation as to the means of procuring abortion in another, is not privileged by the statute, *Hewitt v. Prime*, 21 Wend. 79.

confidentially acquired ; and clerks (*o*), bankers (*p*), stewards (*q*), confidential friends (*r*), and perhaps even licensed conveyancers (*s*), are equally obliged to reveal what has been imparted to them in confidence, except as to matters which the principal himself would not be compelled to disclose, such as his title-deeds and private papers, in a case in which he is not a party.

§ 665. The propriety of extending the privilege to communications made to clergymen in reference to criminal conduct, has been strongly urged, on the ground that evil doers should be enabled with safety to disburden their guilty consciences, and by spiritual instruction and discipline to seek pardon and relief. The law of Papal Rome has adopted this principle in its fullest extent, not only, as already intimated (*t*), excepting such confessions from the general rules of evidence, but punishing the priest who reveals them. It has even gone further ; for Mascardus, after observing that, in general, persons coming to the knowledge of facts under an oath of secrecy are compellable as witnesses to disclose them, states that confessions to a priest are not within the operation of the rule, since they are made not so much to the priest as to the Deity whom he represents ; and he thence draws the jesuitical conclusion that the priest, when appearing as a witness in his private character, may lawfully swear that he knows

(*o*) *Lee v. Birrell*, 3 Camp. 337 ; *Webb v. Smith*, 1 C. & P. 337.

(*p*) *Loyd v. Freshfield*, 2 C. & P. 325, per Abbott, C. J.

(*q*) *Vaillant v. Dodemead*, 2 Atk. 524 ; 4 T. R. 759, per Buller, J. ; *Earl of Falmouth v. Moss*, 11 Price, 455.

(*r*) 4 T. R. 758, per Lord Kenyon ; *Hoffman v. Smith*, Caines, 157, 159.

(*s*) See per Parke, B., in *Turquand v. Knight*, 2 M. & W. 100.

(*t*) Ante, § 635, n. (*z*). By the Capitularies of the French kings, and some other continental codes of the middle ages, the clergy were not only excused, but in some cases were utterly prohibited, from attending as witnesses in any cause. Vid. Capit. Regum Francor. Lib. 7, §§ 91, 118, (A. D. 827,) in *Leges Barbar. Antiq.* vol. 3, pp. 313, 316.—*Leges Langobardicæ*, in the same collection, vol. 1, pp. 184, 209, 237. But from the constitutions of King Ethelred, which provide for the punishment of priests guilty of perjury,—“*Si presbyter alicubi inveniatur in falso testimonio, vel in perjurio*,”—it would seem that the English law of that day did not recognise any distinction between them and the laity, in regard to the obligation to testify as witnesses. Vid. *Leges Barbar. Antiq.* vol. 4, p. 294 ; *Ancient Laws and Inst. of England*, vol. 1, p. 347, § 27.

nothing of the subject. *Hoc tamen restringe, non posse procedere in sacerdote producto in testem contra reum criminis, quando in confessione sacramentali fuit aliquid sibi dictum, quia potest dicere, & nihil scire ex eo; quod illud, quod scit, scit ut Deus, et ut Deus non producit in testem, sed ut homo, et tanquam homo ignorat illud super quo producit (u).* In Scotland, where a prisoner in custody and preparing for his trial has confessed his crimes to a clergyman, in order to obtain spiritual advice and comfort, such confession is privileged; but this privilege is not carried so far as to include communications made confidentially to clergymen in the ordinary course of their duty (v). Though the law of England encourages the penitent to confess his sins "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind," yet the minister, to whom the confession is made, is merely excused from presenting the offender to the civil magistrate, and enjoined not to reveal the matter confessed, "under pain of irregularity" (w). In all other respects he is left to the full operation of the rules of the common law, which recognise no distinction between clergymen and laymen, but provide that all confessions and other matters, not confided to legal counsel, must be disclosed when required for the purposes of justice (x). Neither penitential confessions made to the minister or to members of the party's own church, nor even secrets confided to a Roman Catholic priest in the course of confession, are regarded as privileged communications (y).

(u) Mascard. de Probat. vol. 1, Quæst. v. n. 51; id. Concl. 377. Vid. et P. Farinac. Opera, tit. 8, Quæst. 78, n. 73.

(v) Tait Ev. 386, 387; Alison's Pract. of Crim. L. in Scot. 586.

(w) Const. & Canon, 1 Jac. 1, Can. cxiii.; 2 Gibson's Codex, p. 963.

(x) R. v. Gilham, 1 Moo. C. C. 186.

(y) Butler v. Moore, M'Nally's Ev. 253—255; Anon., Skin. 404, per Holt, C.J.; Du Barré v. Livette, Pea. R. 77; Com. v. Drake, 15 Mass. 161. By a statute of New York, (2 Rev. St. 406, § 72,) "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." A similar statute exists in Missouri, (Rev. St. of 1835, p. 623, § 16.) See also Broad v. Pitt, 3 C. & P. 519; M. & M. 234, S. C. There, Best, C. J., said, that he, for one, would never compel a clergyman to disclose communications made to him by a prisoner; but that if he chose to disclose them, he would receive them in evidence. See also Joy on Confess. 49—58.

§ 666. Although the privilege, in its full extent, applies only to the communications which pass between a client and his legal adviser, yet, with respect to the *production of title-deeds*, the protection has been held applicable to the case of *trustees* and *mortgagees*, who cannot be compelled either to produce the deeds of the cestuis que trust, or mortgagors, or to give parol evidence of their contents (z). It may here be laid down as a general proposition, that, whenever a party is justified in refusing to produce an instrument, he cannot be forced to disclose its contents; and although there may be some dicta, or even decisions (a), to the contrary, yet the rule as above stated may now be considered as established; for, as Mr. Baron Alderson observed in a late case (b), "It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate."

§ 667. The protection afforded to professional confidence applies with equal force, though the client be in no shape before the court(c); and although the rule which excludes hearsay prevents this question from often arising with respect to mere oral communications, it has often been discussed on occasions when an attorney has been called upon, either by subpoena duces tecum or otherwise, to produce documents with which he has been confidentially intrusted by some *stranger* to the suit. In such a case, the Court will inspect the documents, and pronounce upon their admissibility, according as their production may appear to be prejudicial or not to the client; in like manner, as where a witness objects to the production of his own title-deeds (d). The same rule applies

(z) *Davies v. Waters*, 9 M. & W. 608; *R. v. Upper Bodington*, 8 D. & R. 726.

(a) See *Cocks v. Nash*, 6 C. & P. 154, per Gurney, B.; *Marston v. Downes*, 1 A. & E. 31; 3 N. & M. 861, S. C., observed upon by Rolfe, B., in 9 M. & W. 613, 614.

(b) *Davies v. Waters*, 9 M. & W. 612.

(c) *R. v. Withers*, 2 Camp. 578, per Lord Ellenborough.

(d) 1 Ph. Ev. 175; *Copeland v. Watts*, 1 Stark. R. 95; *Harris v. Hill*, D. & R.,

where the documents called for are in the hands of solicitors for the assignees of bankrupts (e), though it was at one time thought that their production was a matter of public duty (f). In all these cases, if the client or principal would have been entitled, had he been called as a witness, to withhold the document, the attorney, agent, or steward will in the absence of consent be bound to do so; but the party calling for the document may, in such an event, give secondary evidence of its contents (g).

§ 668. This protection, though confined to communications between a client and his legal adviser, extends to all the necessary organs by which such communications are effected; and therefore an *interpreter* (h), or an *intermediate agent* (i), is under the same obligation as the legal adviser himself; and if the legal adviser has communicated with such person, he will be as much bound to silence, as if he had communicated directly with his client (j). The rule also extends to an *attorney's town agent* (k), who is considered as standing in precisely the same situation as the attorney; and it has been held applicable to a case submitted, after the institution of the suit, to a *foreign counsel*, and to his opinion thereon (l). Formerly it was thought that a barrister's or an attorney's clerk was not within the reason and exigency of the rule; but as the principals, being unable to transact all their business in person,

N. P. R. 17; 3 Stark. R. 140, S. C.; *Ditcher v. Kenrick*, 1 C. & P. 161; *Doe v. Thomas*, 9 B. & C. 288; 4 M. & R. 218, S. C.

(e) *Laing v. Barclay*, 3 Stark. R. 42; *Bateson v. Hartsink*, 4 Esp. 43; *Cohen v. Templar*, 2 Stark. R. 260; *Hawkins v. Howard*, Ry. & M. 64; 1 C. & P. 222, S. C.; *Corsen v. Dubois*, Holt, N. P. R. 239; *Bull v. Loveland*, 10 Pick. 9, 14.

(f) *Pearson v. Fletcher*, 5 Esp. 90, per Lord Ellenborough.

(g) *Ditcher v. Kenrick*, 1 C. & P. 161; *R. v. Hunter*, 3 C. & P. 591. As to the cases where a witness may refuse to produce his deeds, or to disclose their contents, see ante, §§ 338, 339.

(h) *Du Barré v. Livette*, Pea. R. 77, explained in 4 T. R. 756; *Jackson v. French*, 3 Wend. 337; *Andrews v. Solomon*, 1 Pet. C. C. R. 356; *Parker v. Carter*, 4 Munf. 273.

(i) *Bunbury v. Bunbury*, 2 Beav. 173; *Walker v. Wildman*, 6 Madd. 47. See *Doe v. Jauncey*, 8 C. & P. 101.

(j) *Carpmael v. Powis*, 9 Beav. 16, 20, 21, per Lord Langdale; S. C. 1 Phill. 692, 693, per Lord Lyndhurst, recognising *Walker v. Wildman*, 6 Madd. 47.

(k) *Parkins v. Hawkshaw*, 2 Stark. R. 239, per Holroyd, J.; *Tait Ev.* 385.

(l) *Bunbury v. Bunbury*, 2 Beav. 173.

are under the necessity of employing clerks, it has been since held, that such clerks cannot be permitted to disclose facts coming to their knowledge in the course of employment, unless the barrister or attorney himself might have been interrogated respecting them (*l*). So, where a plaintiff, at the instance of his solicitors, sent out an agent to India, for the express purpose of collecting evidence for him in a pending suit, letters written by the agent either to the plaintiff himself or to his solicitors on the subject of the evidence, have been held to fall within the protection of the rule (*m*).

§ 669. As the privilege is established, not for the benefit of the attorney, but for the protection of the client (*n*), it would seem to extend to an executor in regard to papers coming to his hand as the personal representative of the attorney (*o*). If, however, an attorney, in violation of his duty, should voluntarily communicate to a stranger the contents of an instrument with which he was confidentially intrusted, or should permit him to take a copy, the secondary evidence so obtained would, it seems, be admissible, provided that notice to produce the original were duly given, and the production were resisted on the ground of privilege (*p*). Indeed, it has more than once been laid down, that, though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, provided they be pertinent to the issue. For the Court

(*l*) *Taylor v. Forster*, 2 C. & P. 195, per Best, C. J., cited with approbation in 12 Pick. 93; *Foot v. Hayne*, 1 C. & P. 545; *Ry. & M.* 165, S. C., per Abbott, C. J.; *Bowman v. Norton*, 5 C. & P. 177, per Tindal, C. J.; *R. v. Upper Boddington*, 8 D. & Ry. 726, per Bayley, J.; *Mills v. Oddy*, 6 C. & P. 731; *Jackson v. French*, 3 Wend. 337.

(*m*) *Steele v. Stewart*, 1 Phill. 471.

(*n*) *Herring v. Cloberry*, 1 Phill. 96, per Lord Lyndhurst, Ch.; B. N. P. 284 a.

(*o*) *Fenwick v. Reed*, 1 Meriv. 114, 120, arg.

(*p*) *Lloyd v. Mostyn*, 10 M. & W. 481, 482, per Parke, B., questioning the contrary decision of Bayley, J., in *Fisher v. Heming*, cited 1 Ph. Ev. 170. Parke, B., likened it to the case of an instrument being stolen, and a correct copy taken, and asked whether it would not be reasonable to admit such copy? If the client sustains any injury from such improper disclosure being made, an action will lie against the attorney. *Taylor v. Blacklow*, 3 Bing. N. C. 236.

will not take notice how they were obtained, whether lawfully or unlawfully, nor will it raise an issue to determine the question (g).

§ 670. In order to protect communications, they must have been made to the legal adviser, while he was acting, or at least while he was considered by the client as acting (r), in that capacity. The rule, however, does not require any regular *retainer*, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be, in any way, consulted in his professional character (s). But it would seem, that if a person be consulted confidentially, under the erroneous supposition that he is an attorney, he will be compelled to disclose the matters communicated (t); and where a prisoner in custody on a charge of forgery wrote to a friend, requesting him "to ask Mr. G. or any other attorney" a question respecting the punishment of forgery, the letter was admitted in evidence, on the ground that it did not appear that the relation of attorney and client ever subsisted between Mr. G. and the prisoner (u). So, if a party were to go to an attorney to discount a forged note, or to raise money on a forged will, what passed at the interview would of course not be privileged, unless, perhaps, in the event of the attorney being consulted as the party's *own* solicitor (v).

§ 671. We have hitherto been considering the question of privileged communications, with respect to cases in which the *legal adviser* either is called as a witness, or has a bill of discovery filed against him in Chancery; but although the privilege is, as we before observed, that of the client, and not that of the professional adviser, the rule of protection has not been laid down in equally broad terms, where the *client* himself is the party interrogated.

(g) *Legatt v. Tollervey*, 14 East, 302; *Jordan v. Lewis*, id. 305, n.; *Doe v. Dale*, 3 Q. B. 619; *Com. v. Dana*, 2 Metc. 329, 337.

(r) *Smith v. Fell*, 2 Curt. 667. There, a communication was held to be privileged, which was made by a party to a solicitor, under the impression that the latter had acceded to a request to act as his legal adviser.

(s) *Foster v. Hall*, 12 Pick. 89. See also *Bean v. Quimby*, 5 N. Hamp. 94.

(t) *Fountain v. Young*, 6 Esp. 113, per Sir James Mansfield, C. J.

(u) *R. v. Brewer*, 6 C. & P. 363, per Park, J.

(v) *R. v. Farley*, 2 C. & Kir. 313, 317, 318. See ante, § 661; post, § 674.

It has indeed been established, that, *in this event*, all communications between the solicitor and client, whether pending, and with reference to litigation, or made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation, though not in contemplation, or with reference to, that litigation, are protected; as also are communications made respecting the subject-matter in question, pending, or in contemplation of, litigation on the same subject with other persons, with the view of asserting the same right (*w*). If, however, communications pass between a client and solicitor *before any dispute* has arisen between the client and his opponent, the opponent can compel the client, by a bill in equity, to disclose these communications, although they relate to the matters which form the subject of the suit, except so far as they contain mere legal advice or opinions (*x*). This doctrine was propounded by the House of Lords (*y*) at a time when the subject of professional confidence was not developed to the same extent as it is at the present day (*z*); but although the case in which it was so held has been since disapproved of by almost every judge under whose notice it has been brought, and its principle has more than once been successfully exposed and refuted, yet, as a decision of the Court of Last Resort, it must be reluctantly followed till the Legislature shall think fit to interfere, or the question shall arise in a suit of sufficient importance to warrant a second appeal to the House of Peers (*a*).

(*w*) *Holmes v. Baddeley*, 1 Phill. 476; per Wigram, V.-C., in *Lord Walsingham v. Goodricke*, 3 Hare, 124, 125, citing *Bolton v. Corp. of Liverpool*, 3 Sim. 467; 1 Myl. & K. 88, S. C.; *Hughes v. Biddulph*, 4 Russ. 190; *Vent v. Pacey*, 4 Russ. 193; *Clagett v. Phillips*, 2 Y. & C., C. C. 82; *Combe v. Corp. of London*, 1 id. 631. See also *Woods v. Woods*, 4 Hare, 83; *Adams v. Barry*, 2 Y. & C., C. C. 167; *Knight v. Marq. of Waterford*, 2 Y. & C. Ex. R. 38; *Curling v. Perring*, 2 Myl. & K. 38; and *Nias v. Northern and Eastern Railway Co.*, 3 My. & Cr. 355. These cases overrule *Preston v. Carr*, 1 Y. & Jer. 175, and *Newton v. Beresford*, 1 You. 376. See 3 Hare, 129.

(*x*) *Lord Walsingham v. Goodricke*, 3 Hare, 122, per Wigram, V.-C., reluctantly submitting to *Radcliffe v. Fursman*, 2 Bro. P. C. 514, tom. ed. See also *Greenlaw v. King*, 1 Beav. 137, where Lord Langdale compelled a son and heir to discover a case, which had been submitted to counsel by his father, and had come with the estate to his hands.

(*y*) *Radcliffe v. Fursman*, 2 Bro. P. C. 514, tom. ed.

(*z*) Per Wigram, V.-C., 3 Hare, 127.

(*a*) See *Bolton v. Corp. of Liverpool*, 1 My. & K. 88, per Lord Brougham;

§ 672. If an attorney be *employed for two parties*, as for mortgagor and mortgagee, and peruse on behalf of the former his abstracts of title, he cannot, as against him, disclose their contents (*b*); and where a professional man was engaged by vendor and purchaser to prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties, it was held that he could not produce it at the trial against the interest of the purchaser's devisees, though with the consent of the vendor (*c*). If, however, an attorney, acting as such for opposite parties, has an offer made to him by the one for the purpose of being communicated to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party (*d*). And, where two persons, having a dispute about a claim made by one of them upon the other, went together to an attorney, when one of them made a statement, and instructed the attorney to write a letter to a third party on the subject of the claim,—it was held that both the statement and the letter were admissible in evidence (*e*). In all these cases the question would seem to be, was the communication made by the party to the witness in the character of his own *exclusive* attorney? If it was, the bond of secrecy is imposed upon the witness; if it was not, the communication will not be privileged (*f*).

§ 673. The protection does not cease with the termination of the suit, or other litigation, or business, in which the communications were made; nor is it affected by the party's ceasing to employ the attorney, and retaining another, nor by any other change of

Pearce v. Pearce, 16 Law J. N. S. Ch. 153, per K. Bruce, V.-C.; Walker v. Wildman, 6 Madd. 47; Preston v. Carr, 1 Y. & Jer. 175; Lord Walsingham v. Goodricke, 3 Hare, 127—130; Bishop of Meath v. Marq. of Winchester, 10 Bli. 375, 455. See also two articles in Law Mag. vol. xvii., pp. 51—74, and vol. xxx. pp. 107—123.

(*b*) Doe v. Watkins, 3 Bing. N. C. 421; 4 Scott, 155, S. C. But see R. v. Avery, 8 C. & P. 596, cited post, § 674.

(*c*) Doe v. Seaton, 2 A. & E. 171; 4 N. & M. 81, S. C.

(*d*) Baugh v. Cradocke, 1 M. & Rob. 182; Cleve v. Powel, id. 228; Perry v. Smith, 9 M. & W. 681.

(*e*) Shore v. Bedford, 5 M. & Gr. 271. See also Griffith v. Davies, 5 B. & Ad. 502, and Weeks v. Argent, 16 L. J. N. S. Ex. 209.

(*f*) Perry v. Smith, 9 M. & W. 682, 683, per Parke, B.

relation between them, nor by the attorney's being struck off the rolls (*g*), nor even by the death of the client. The seal of the law, once fixed upon the communications, *remains for ever* (*h*), *unless removed by the party himself*, in whose favour it was there placed (*i*); and, therefore, if the client becomes a bankrupt, his assignees cannot waive the privilege without his particular permission (*j*). Neither does the client waive his privilege by calling the attorney as a witness, unless he also examines him in chief to the matter privileged (*k*); and even in that case, it has been held in Ireland, that the cross-examination must be confined to the point upon which the witness has been examined in chief (*l*).

§ 674. Whether the protection can be removed without the client's consent, in cases where the interests of *criminal justice* require the production of the evidence, may admit of some doubt. In one case where a party had intrusted an attorney with a promissory note, and had instructed him to bring an action upon it, Mr. Justice Holroyd held that the attorney ought not to produce the note, on the trial of a subsequent indictment against his client for forgery (*m*); and a similar decision appears to have been pronounced by the Court of King's Bench in the time of Lord Mansfield (*n*). On the other hand, Mr. Justice Patteson has expressed an opinion that the first case above cited is not law, and has compelled an attorney, who had been employed by a mortgagor and mortgagee to negotiate a loan between them, and had received from the former a forged will as part of his title-deeds, to produce the will on a trial of the mortgagor for forging that instrument (*o*).

(*g*) *Earl Cholmondeley v. Lord Clinton*, 19 Ves. 268.

(*h*) *Wilson v. Rastall*, 4 T. R. 759, per Buller, J.; *Parker v. Yates*, 12 Moore, 520.

(*i*) *Merle v. More*, Ry. & M. 390, per Best, C. J.; *Baillie's case*, 21 How. St. Tr. 341, 358, 408. "If the client be willing, the Court will compel the counsel to discover what he knows," per North, C. J., in *Lea v. Wheatley*, in C. B. Parch. 30 Car. 2, cited in note to 20 How. St. Tr. 574.

(*j*) *Bowman v. Norton*, 5 C. & P. 177, per Tindal, C. J.

(*k*) *Vaillant v. Dodemead*, 2 Atk. 524; *Waldron v. Ward*, Sty. 449; *Bate v. Kinsey*, 1 C. M. & R. 38.

(*l*) *M'Donnell v. Conry*, Ir. Cir. R. 807, per Richards, B.

(*m*) *R. v. Smith*, cited in 1 Ph. Ev. 171.

(*n*) *R. v. Dixon*, 3 Barr. 1687. See also *Anon.*, 8 Mass. 370.

(*o*) *R. v. Avery*, 8 C. & P. 596, 599. See also *ante*, §§ 661, 670.

So, where a party, having possessed himself of the title-deeds of a deceased person, placed a forged will of the deceased amongst them, and then sent the whole to his attorney, ostensibly for the purpose of asking his advice upon them, but really, as it seemed, that the attorney might find the will and act upon it,—the judges unanimously held, that the attorney was bound to produce the will on the trial of his client for forgery, it not having been intrusted to him in professional confidence, *even if that would have made any difference* (*p*). Again, where, a prisoner was indicted for forging a will, and it appeared that his wife had taken the will to an attorney, and asked him to advance money upon it for her husband, which he refused to do, but took a copy of the will,—the judges most properly held that such copy was admissible as secondary evidence, and that the conversation between the wife and the attorney was not privileged (*q*). This last case, however, is scarcely an authority on either side of the question; for the judges took the distinction that the attorney consulted was not the prisoner's own attorney.

§ 675. This rule may be further illustrated by reference to the cases in which the attorney may be examined, and which are therefore sometimes mentioned as *exceptions* to the rule. These apparent exceptions(*r*) are—where the knowledge was not acquired by the attorney *solely* by his being employed professionally, but was in some measure obtained by his acting as a *party* to the transaction, and the more especially so, if this transaction was fraudulent;—or where the communication was made *before* the attorney *was employed* as such, or *after* his employment had *ceased*;—or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was therefore only applied to *as a friend*;—or where there could not be said, in any

(*p*) R. v. Hayward, 2 C. & Kir. 234.

(*q*) R. v. Farley, 2 C. & Kir. 313.

(*r*) Besides the exceptions here stated, the following case may be mentioned. In a suit for taking a partnership account between solicitors, semble that the plaintiff is entitled to the discovery and production of papers material to the account, though they relate to professional business transacted for their clients, and the consequent effect of their production must be that some stranger will become acquainted with matters entrusted to the partners in confidence. *Brown v. Perkins*, 2 Hare, 540. This case obviously rests on necessity, for otherwise no account could ever be taken between solicitors acting in partnership.

correctness of speech, to be a communication at all; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact *any other man*, if there, would have been *equally conusant* (and even this has been held privileged in some of the cases);—or where the matter communicated was *not in its nature private*, and could in no sense be termed the subject of a confidential disclosure;—or where the thing had *no reference to the professional employment*, though disclosed while the relation of attorney and client subsisted;—or where the attorney, having made himself a *subscribing witness*, and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the attorney is not called upon to disclose matters, which he can be said to have learned by communication with his client, or on his client's behalf; matters, which were so committed to him in his capacity of attorney; and matters, which in that capacity alone he had come to know (*s*).

§ 676. It may here be expedient to illustrate these apparent exceptions somewhat more at length. Thus, if an attorney, having been engaged in a conspiracy, be willing to turn informer, he cannot be prevented from disclosing what he knows of the transaction, though he may have been employed by some of the guilty parties in his professional character, and have acquired much of his knowledge in consequence of that connection (*t*). In one case (*u*), usury in a mortgage was proved by the plaintiff's attorney who prepared the deed, and who was called by the defendant to prove the consideration usurious. Lord Kenyon, who admitted this evidence, assumed that the attorney had, by his conduct, become a party to the transaction; but as the facts do not warrant this assumption, the case cannot be supported at the present day (*x*), and is only

(*s*) Per Lord Brougham, in *Greenough v. Gaskell*, 1 My. & K. 104. See also, *Desborough v. Rawlins*, 3 My. & Cr. 521, 522; *Story's Eq. Pl.* §§ 601, 602; *Bolton v. Corp. of Liverpool*, 1 My. & K. 88; *Annesley v. E. of Anglesea*, 17 How. St. Tr. 1239—1244.

(*t*) 1 My. & K. 103, 104, 109, per Lord Brougham.

(*u*) *Duffin v. Smith*, Pea. R. 108.

(*x*) See Lord Brougham's observations in 1 My. & K. 109. But see ante, § 674.

valuable as recognising the general principle, that, if an attorney acts as a party, no knowledge he obtains will be privileged. Again, an attorney has been compelled to disclose a confession made to him by his client before the retainer, respecting an erasure in a will (s); as also a gratuitous conversation which his client had held with him after the compromise of a suit, in which he stated that he was glad the action was settled, as the promissory note on which it was founded had been indorsed to him without consideration, and with notice that it was void as being mixed up with a lottery transaction (t). On the other hand, where a person, having possession of a deed in the character of trustee to the defendant, had first obtained a knowledge of its contents while acting as his attorney, the knowledge thus obtained was held to be privileged (u): and in another case, where a solicitor became trustee under a deed for the benefit of his client's creditors, it was held that subsequent communications made to him by the client could not be divulged (v).

§ 677. Where an attorney had been confidentially consulted, but had not been professionally employed, because he was at that time acting as under-sheriff, he was held bound to disclose what had been communicated to him (w). Again, in *Griffith v. Davies* (x), a witness called by the plaintiff was permitted to state a conversation, in which the defendant proposed a compromise to the plaintiff, although, when the conversation took place, the witness was attending as attorney for the defendant; for in this case, the knowledge gained by the witness was not by reason of its being entrusted to him in his professional character, but merely by his being present at the conversation (y). So, if an attorney, by the direction of his client, makes a proposal to the opposite party, he may be compelled to disclose what he stated to that party, though

(s) *Cuts v. Pickering*, 1 Ventr. 197.

(t) *Cobden v. Kendrick*, 4 T. R. 431.

(u) *Davies v. Waters*, 9 M. & W. 608. In that case, the witness, as trustee, might equally have refused to state the contents of the deed, but it was objected in Banc that this point was not raised at *Nisi Prius*. See ante, § 666.

(v) *Pritchard v. Foulkes*, 1 Coop. 14.

(w) *Wilson v. Rastall*, 4 T. R. 753.

(x) 5 B. & Ad. 502. See also *Shore v. Bedford*, 5 M. & Gr. 271; *Weeks v. Argent*, 16 L. J. N. S. Ex. 209.

(y) Per Alderson, B., in *Davies v. Waters*, 9 M. & W. 611.

he cannot divulge what his client had communicated to him (*z*); and if communications from an adverse party be made, either directly to the solicitor for the purpose of being communicated to the client (*a*), or to the client himself in the presence of the solicitor (*b*), the solicitor is not at liberty to withhold such proceedings. Indeed, he is bound, as it seems, to produce all letters, and to disclose all information, communicated to him from *collateral* quarters (*c*).

§ 678. It may also be laid down as a general proposition, that the legal adviser must disclose all questions put to him by his client, together with his answers thereto, provided such questions were asked in order to gain information respecting *matters of fact*, as distinguished from those put with the view of obtaining *legal advice* (*d*). This proposition has, on one occasion (*e*), been applied to circumstances which seem scarcely to have warranted its application. The question was, whether the client had committed an act of bankruptcy on a particular day. On that day the client inquired of his attorney, whether he could safely attend a particular meeting of his creditors without being arrested for debt. The attorney advised him to remain in his office, until it was ascertained whether the creditors would engage to give him safe conduct, and he accordingly remained there for two hours to avoid being arrested, till the attorney returned from the meeting. The Court held that what passed between the attorney and his client was receivable in evidence; Lord Tenterden observing, that “a man could hardly ask, *as matter of law*,

(*z*) Per Parke and Patteson, Js., 5 B. & Ad. 503, commenting on and questioning *Gainsford v. Grammar*, 2 Camp. 9. See also *Ripon v. Davies*, 2 Nev. & M. 310.

(*a*) *Spenceley v. Schulenburgh*, 7 East, 357. There the attorney was held bound to discover the contents of a notice to produce documents, which he had received from the opposite attorney.

(*b*) *Desborough v. Rawlins*, 3 My. & Cr. 515, per Lord Cottenham.

(*c*) Thus, a communication between an attorney and one of his client's witnesses as to the evidence to be given by the witness is not privileged; *Mackenzie v. Yeo*, 2 Curt. 866.

(*d*) *Sawyer v. Birchmore*, 3 My. & K. 572, per Lord Cottenham; *Spenceley v. Schulenburgh*, 7 East, 357; *Desborough v. Rawlins*, 3 My. & Cr. 515.

(*e*) *Bramwell v. Lucas*, 2 B. & C. 743, observed upon by Lord Brougham, in 1 My. & K. 113—115; and by Lord Cottenham, in 3 My. & Cr. 520—522.

whether he would be free from arrest while attending a voluntary meeting of creditors ; though he might well ask, *as matter of fact*, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent an arrest ;" and his Lordship added, "The attorney gives no *legal* advice, his answer implying that no arrangement had been made, but that he would see at the meeting whether any could be effected ; and he recommends his client, not as a *legal* adviser, but as any agent or any friend might have recommended, to stay where he was till that matter of fact could be ascertained" (*f*).

§ 679. On a somewhat similar ground it has been held, that an attorney may be called, either to prove his client's handwriting, though he be acquainted with it only from having seen him sign documents in the cause (*g*) ; or to disclose the name of the person by whom he was retained, in order to let in the declarations and admissions of the real party in interest (*h*) ; or to prove the fact that he is in possession of a certain document, though he obtained it from his client in the course of communication with reference to the cause, for the purpose of letting in secondary evidence of its contents, where notice to produce has been duly given (*i*). From one case it would even seem that an attorney might be compelled to divulge the character in which his client employed him ; as, for instance, whether as executor, or trustee, or on his own private account (*j*) ; but, in America, it has been held, that counsel could not state whether they were employed to conduct an ejectment for their client, as *landlord of the premises* (*k*).

§ 680. On the other hand, it appears clear, that a legal adviser

(*f*) 2 B. & C. 749, 750.

(*g*) *Hurd v. Moring*, 1 C. & P. 372, per Abbott, C. J. ; *Johnson v. Daverne*, 19 Johns. 134 ; 4 Hawk. P. C., B. 2, c. 46, § 89.

(*h*) *Levy v. Pope*, M. & M. 410, per Parke, J. ; *Brown v. Payson*, 6 N. Hamps. 443.

(*i*) *Coates v. Birch*, 2 Q. B. 252 ; 1 G. & D. 474, S. C. ; *Bevan v. Waters*, M. & M. 235, per Best, C. J. ; *Eicke v. Nokes*, id. 303.

(*j*) *Beckwith v. Benner*, 6 C. & P. 681, per Gurney, B.

(*k*) *Chirac v. Reinicker*, 11 Wheat. 280, 295.

cannot disclose in what condition an instrument was when entrusted to him by his client, as whether or not it were then stamped, or indorsed, or had an erasure upon it (*l*); and in an action of trover for a lease, brought by the assignees of a bankrupt, where the question was whether the lease had been deposited with the defendant by the bankrupt before or after the bankruptcy, an attorney, who, after the act of bankruptcy had been applied to by the bankrupt to procure a loan, was not permitted to answer a question as to whether his client had, on that occasion, brought to him the lease in question, for the purpose of raising money upon it (*m*). So, where the assignees of a bankrupt, in an action of assumpsit brought by them, endeavoured to establish that the bankrupt had committed an act of bankruptcy by having made a fraudulent conveyance to his son, and, in order to prove this transaction, called the bankrupt's attorney, Lord Ellenborough held that, though, as attesting witness to the deed, he was bound to disclose what took place at the time of its execution, he was privileged from stating what occurred during its concoction and preparation, and could not be asked whether it had not been subsequently destroyed, if the only knowledge he had, as to its concoction, preparation, or destruction, was acquired from his confidential situation as attorney (*n*).

§ 681. Again, the attorney may be called to identify his client as the person who has put in, or sworn, or signed an answer in Chancery, because this, so far from being a secret, is in its very nature a matter of publicity (*o*). The privilege also does not

(*l*) *Wheatley v. Williams*, 1 M. & W. 533. In B. N. P. 284 a., it is stated, that "if the question were about a rasure in a deed or will, the attorney might be examined to the question, whether he had ever seen it in any other plight;" but in *Wheatley v. Williams*, Lord Abinger observed that this passage "must apply to a case where the attorney has his knowledge independently of any communication from the client; it cannot mean that where the attorney, coming to the client for a confidential purpose, obtains some other collateral information which he would not otherwise have possessed, he can be compelled to disclose it," p. 541. See also, *Brown v. Payson*, 6 N. Hamps. 443.

(*m*) *Turquand v. Knight*, 2 M. & W. 98.

(*n*) *Robson v. Kemp*, 5 Esp. 52.

(*o*) B. N. P. 284 b.; *Studdy v. Sanders*, 2 D. & Ry. 347; *Doe v. Andrews*, 2 Cowp. 848, per Lord Mansfield; cited by Lord Brougham in 1 My. & K. 108, overruling *R. v. Watkinson*, 2 Str. 1122.

attach to *unnecessary communications* made by a client to his legal adviser; and therefore a prosecutor's attorney has been allowed to state that, pending the proceedings on the indictment, his client had observed to him that he would give a large sum to have the prisoner hanged (*p*); and, in an action brought by an attorney for his bill, where the question was whether he had been employed by the defendant or by a third party, a statement made by the plaintiff to his attorney, on introducing such third party to him, was held to be excluded from the rule of privilege (*q*). So, if an attorney *attests an instrument* which his client executes, he may be compelled to prove the execution; for by becoming a subscribing witness he makes himself a public man, and pledges himself to give evidence on the subject, whether he be called by the party to whom the deed is executed, or by any other person who claims an interest in the property (*r*).

§ 682. *Judges, arbitrators, and counsel* may be mentioned as forming a *second class* of persons, who, from motives of public policy, are not compelled to testify as to certain matters, in which they have been judicially or professionally engaged; though, like ordinary persons, they may be called upon to speak to any foreign and collateral matters, which happened in their presence, while the trial was pending, or after it was ended (*s*). In regard to judges of courts of record, it is considered dangerous, or at least highly inconvenient, to compel them to state what occurred before them in court; and on this ground the grand jury have been advised not to examine the chairman of the Quarter Sessions, as to what a person testified in a trial in that court (*t*). The case of arbitrators is governed by the same general policy; and neither the courts of law nor of equity will disturb decisions deliberately made by arbitrators, by requiring them to disclose the grounds of their award, unless under very cogent circumstances, such as upon

(*p*) *Annesley v. E. of Anglesea*, 17 How. St. Tr. 1223—1244; *Cobden v. Kendrick*, 4 T. R. 431, cited ante, § 676.

(*q*) *Gillard v. Bates*, 6 M. & W. 547; 8 Dowl. 774, S.C.

(*r*) *Doe v. Andrews*, 2 Cowp. 845; *Robson v. Kemp*, 5 Esp. 53; 4 id. 235; *Sandford v. Remington*, 2 Ves. 189.

(*s*) *R. v. E. of Thanet*, 27 How. St. Tr. 845—848.

(*t*) *R. v. Gazard*, 8 C. & P. 595, per Patteson, J.

an allegation of fraud ; for *Interest reipublicæ ut sit finis litium* (u). If an award be made in favour of a defendant, upon the examination of the parties, or the inspection of their books, which would not have been legal evidence had the cause been tried, the arbitrator, in an action for a malicious arrest, brought by the defendant against the former plaintiff, will not be *permitted* to depose as to what transpired before him (v) ; though, in ordinary cases, where he has proceeded according to strict rules of law, he may, by his own consent, be examined respecting the facts proved, or the matters claimed, at the reference (w). On the same ground, it has been held that a barrister cannot be forced to prove what was stated by him on a motion before the court (x) ; and the like privilege has been strenuously claimed, though not expressly recognised, where a counsel was called upon as a witness to disclose a confidential negotiation, into which, on behalf of his client, he had entered with a third party, though the client himself waived all objection to the course of examination proposed (y).

§ 683. We now proceed to the *third class* of cases, in which evidence is excluded from motives of public policy, namely, *secrets of State*, or things, the disclosure of which would be prejudicial to the public interest. These matters are such as concern the administration, either of penal justice, or of government ; but the principle of public safety is in both cases the same, and the rule of exclusion is applied no further than the attainment of that object requires. Thus, in Crown prosecutions, and in Exchequer informations for frauds committed against the revenue-laws, witnesses for the Crown *will not*, on cross-examination, *be permitted to disclose* either the names of their employers, or the nature of the connection between them, or the names of the persons from whom they received information, or the names of those to whom they gave information, whether such last-mentioned persons were magistrates,

(u) *Johnson v. Durant*, 4 C. & P. 327 ; 2 B. & Ad. 925, S. C. ; *Ellis v. Saltan*, 4 C. & P. 327, n.(a) ; *Story*, Eq. Pl. §§ 599, 824, 825, n. ; 2 *Story*, Eq. Jurisp. §§ 1457, 1498 ; *Anon.*, 3 Atk. 644.

(v) *Haberahan v. Troby*, Pea. Ad. Cas. 181 ; 3 Esp. 38, S. C.

(w) *Martin v. Thornton*, 4 Esp. 181, per Lord Alvanley.

(x) *Curry v. Walter*, 1 Esp. 456, per Eyre, C. J.

(y) *Baillie's case*, 21 How. St. Tr. 358—361.

or actually concerned in the executive administration, or were only the channel through which the communication was made to Government (*z*). Neither can the witness be asked whether he was himself the informer (*a*). "It is perfectly right," said Lord Chief Justice Eyre, in Hardy's case (*b*), "that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which that detection is made, should not be unnecessarily disclosed."

§ 684. The protection afforded by this rule will be equally upheld, though the witness, in his examination in chief, has admitted that suggestions have been made to him on the part of the Government (*c*); and the doctrine has been even carried so far, that, where a witness, believing the views of certain parties to be dangerous to the State, had consulted a private friend as to what steps he should pursue, and the friend advised him to communicate the information to Government, a majority of the learned judges held that the name of this friend could not be disclosed (*d*). They were also, in this case, unanimously of opinion, that all questions tending to the discovery of the channels by which the information was given to the officers of justice, were, upon the general principle of public convenience, to be suppressed; that all persons in that situation were protected from the discovery; and that, if an objection was raised to the question, it was no more competent for the defendant to ask who the person was that advised the witness to give information, than to ask to whom he gave it in consequence of that advice, or to put any other question respecting the channel of communication, or all that was done under it.

(*z*) *R. v. Watson*, 32 How. St. Tr. 100—103; 2 Stark. R. 135, S. C.; *R. v. Hardy*, 24 How. St. Tr. 753, 808—820; 1 Ph. Ev. 178—180.

(*a*) *Att.-Gen. v. Briant*, 15 M. & W. 169.

(*b*) 24 How. St. Tr. 808.

(*c*) *R. v. O'Connell*, *Armst. & Trev. R.* 178, 179. See also pp. 233, 240, of same report, where the general doctrine was recognised and acted upon.

(*d*) *R. v. Hardy*, 24 How. St. Tr. 808—820, Eyre, C. J., Hotham, B., Gross, J., pro; Macdonald, C. B., and Buller, J., con.

The witness, however, may still be asked, though there appears to be no practical use in putting such a question, whether the person to whom the information was communicated was a magistrate or not (e).

§ 685. It may well be doubted whether this rule of protection applies to ordinary prosecutions (f); and even when it is applicable, as it unquestionably is whenever the Government is directly concerned, it may sometimes, if rigidly enforced, be productive of great individual hardship; since, where a witness is giving an account of what occurred at a distant period, it is obviously material to ascertain whether he gave substantially the same account recently after the transaction; and if the object be to shake the credit of the witness, it is equally important to know whether a communication, which he asserts that he made to a certain person, was, in fact, ever so made. On the other hand, it is absolutely essential to the welfare of the State, that the names of parties who interpose in situations of this kind should not be divulged; for otherwise, be it from fear, or shame, or dislike of being publicly mixed up in inquiries of this nature, few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that many great crimes would pass unpunished (g).

§ 686. The opinion which seems best supported by decided cases and dicta, is, that the *proceedings of grand jurors* should, on similar grounds of public policy, be regarded as privileged communications. It has been thought by some persons, though we contend erroneously, that the preliminary inquiry as to the guilt or innocence of a party accused should be secretly conducted; and, in furtherance of this object, every grand juror is sworn to secrecy. One reason may be, to prevent the escape of the party, should he know that proceedings were in train against him; another may be, to secure freedom of deliberation and opinion among the grand jurors, which might be impaired if the part taken

(e) 24 How. St. Tr. 808.

(f) Att.-Gen. v. Briant, 15 M. & W. 181, per Pollock, C. B.

(g) Home v. Bentinck, 2 B. & B. 162, per Dallas, C. J.; U. S. v. Moses, 4 Wash. 726.

by each could be made known to the accused or to the Crown ; and although these reasons are clearly fallacious, since the first is answered by the fact, that most crimes are primarily investigated by an open inquiry before the committing magistrate, and the second rests on an assumption of pusillanimity and meanness, which the gentlemen who constitute the grand jury but little deserve ; still, they are the best that can be furnished in support of a system which we are persuaded is often productive of perjury, often of collusion, and sometimes of oppression (*k*). The rule includes not only the grand jurors themselves, but their clerk (*i*), if they have one, and the prosecuting officer (*j*), if he be present at their deliberations ; all these being equally concerned in the administration of the same portion of penal law. They are not permitted to disclose what number of jurors were present when a case was brought before them, or the number or names of the jurors who agreed or refused to find the bill of indictment (*k*) ; neither can they be called on the trial to explain their finding (*l*), or to detail the evidence on which the accusation was founded (*m*), or to show that a witness has given testimony in court contrary to what he had sworn before them (*n*). It is, however, proper to observe,

(*k*) See observations on this subject, and on the general inutility of grand juries, in *Law Mag.* vol. xxxi., pp. 242—251. (*i*) 12 Vin. Abr. Ev. B. a. 5.

(*j*) So decided in *America, Com. v. Tilden*, cited in 2 St. Ev. 232, n. (1) by Metcalf ; *M'Lellan v. Richardson*, 1 Shepl. 82.

(*k*) *R. v. Marsh*, 6 A. & E. 236. See 4 Hawk. P. C. b. 2, ch. 25, § 15. In *America*, grand jurors have been asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact ; *M'Lellan v. Richardson*, 1 Shepl. 82 ; *Low's case*, 4 Greenl. 439 ; *Com. v. Smith*, 9 Mass. 107.

(*l*) *R. v. Cooke*, 8 C. & P. 584, per Patteson, J.

(*m*) See *R. v. Watson*, 32 How. St. Tr. 107, per Lord Ellenborough, and 6 A. & E. 237, arg. ; *Hindekoper v. Cotton*, 3 Watts, 56 ; *M'Lellan v. Richardson*, 1 Shepl. 82 ; *Low's case*, 4 Greenl. 439, 446, 453 ; *Burr's trial* [Anon.], Ev. for deft., p. 2.

(*n*) 12 Vin. Abr. Ev. H. ; *Imlay v. Rogers*, 2 Halst. 347. Mr. Chitty, in his 1st vol. of *Crim. Law*, p. 322, states that perjury before the grand jury is indictable, and refers to his vol. on *Prec.*, which contains nothing on the subject. Mr. Christian, also, in a note to 4 Bl. Com. 126, narrates, that, at York, a grand juror, hearing a witness swear in court contrary to the evidence which he had given before the grand jury, told the judge, "and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury." What became of this case does not appear. By the *Rev. St. of New York*, vol. ii, p. 724, § 31,

that in an action for a malicious indictment, Lord Kenyon is reported to have allowed the plaintiff to call one of the grand jury, in order to prove that the defendant was the prosecutor (*o*), and that a similar course was pursued on another occasion without opposition (*p*). In illustration of this subject it may be added, that the clerk of the Property Tax Commissioners has been held bound to produce in a court of justice his official books, and to answer all questions respecting the collection of the tax, though he had been sworn, on entering office, not to disclose anything he should learn in that capacity, without the consent of the Commissioners, or unless by force of some Act of Parliament (*q*).

§ 687. On similar grounds of public policy, and for the protection of parties against fraud, the law excludes the testimony of *traverse* or *petty jurors*, when offered to prove *mistake* or *misbehaviour* in the jury in regard to the verdict. Thus, where a motion was made to amend the *postea* by increasing the damages, the Court refused to admit an affidavit sworn by all the jurymen, in which they stated their intention to have been to give the plaintiff such increased sum (*r*). So, also, on several occasions, affidavits that verdicts have been decided by lot have been rejected on motions for new trials, whether such affidavits were sworn by individual jurymen (*s*), or by strangers, stating the subsequent admissions of jurors to themselves (*t*), or even that a declaration had been made by one juror in the hearing of his fellows in open court after the verdict had been pronounced (*u*). In all cases of this kind, the Court must obtain their knowledge of the misconduct complained of, either from the officer who had charge of the jury (*x*), or from some other person who actually witnessed the transaction (*y*).

a juror may be asked whether the testimony of a witness given before the grand jury corresponds with that given upon the trial, and this appears to be the common sense view of the matter.

(*o*) *Sykes v. Dunbar*, 2 Selw. N. P. 1068.

(*p*) *Freeman v. Arkell*, 1 C. & P. 137, cor. Park, J.

(*q*) *Lee v. Birrell*, 3 Camp. 337, per Lord Ellenborough.

(*r*) *Jackson v. Williamson*, 2 T. R. 281.

(*s*) *Vasie v. Delaval*, 1 T. R. 11; *Owen v. Warburton*, 1 New R. 326; *Little v. Larrabee*, 2 Greenl. 37, 41, n.

(*t*) *Straker v. Graham*, 4 M. & W. 721; *The State v. Freeman*, 5 Conn. 348; *Meade v. Smith*, 16 Conn. 346.

(*u*) *Burgess v. Langley*, 5 M. & Gr. 722.

(*x*) *Id.* 725, per Cresswell, J.

(*y*) *Vasie v. Delaval*, 1 T. R. 11, per Lord Mansfield.

§ 688. On a like principle of public policy, a witness will not be permitted to disclose in a court of justice what took place *within the walls of Parliament*, or to relate any expressions or arguments that may have been used by one of the members in the course of debate; though it seems he may be asked as to the fact, whether or not a member spoke upon a particular subject of discussion (*r*).

§ 689. On similar grounds, the official transactions between the *heads of the departments of Government and their subordinate officers*, are, in general, treated as *secrets of State*. Thus, communications between a colonial governor and his attorney-general, on the condition of the colony or the conduct of its officers (*s*); or between such governor and a military officer under his authority (*t*); the report of a military commission of inquiry, made to the commander-in-chief (*u*); and the correspondence between an agent of the government and a Secretary of State (*v*); or between the Directors of the East India Company and the Board of Control (*w*); or between an officer of the Customs and the Board of Commissioners (*x*),—are confidential and privileged matters, which the interests of the State will not permit to be revealed. The President of the United States, and the Governors of the several States, are not bound to produce papers or disclose information communicated to them, where, in their own judgment, the disclosure would on public considerations be inexpedient (*y*). And where the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary

(*r*) *Plunkett v. Cobbett*, 2 How. St. Tr. 71, 72; 5 Esp. 136, S. C., per Lord Ellenborough. See *Law v. Scott*, 5 Har. & J. 438, contra; sed qu.

(*s*) *Wyatt v. Gore*, Holt's N. P. C. 299.

(*t*) *Cooke v. Maxwell*, 2 Stark. R. 183.

(*u*) *Home v. Bentinck*, 2 B. & B. 130; 4 Moore, 563, S. C.

(*v*) *Anderson v. Hamilton*, 2 B. & B. 156, n.; 8 Price, 244, n.; and 4 Moore, 533, n., S. C.; 2 Stark. R. 185, per Lord Ellenborough, cited by the Att.-Gen.; *Marbury v. Madison*, 1 Cranch, 144.

(*w*) *Smith v. East India Co.*, 1 Phill. 50; 3 & 4 Will. 4, c. 85, §§ 29, 30, 31.

(*x*) *Black v. Holmes*, Fox & Smith, R. 28.

(*y*) 1 Burr's Trial, 186, 187, per Marshall, C. J.; *Gray v. Pentland*, 2 Serg. & R. 23.

evidence of their contents (z). It has, however, been held, that, in an action of trespass brought against the governor of a colony, a military officer under his control might be asked in general terms, whether he did not act by the direction of the defendant, though the written instructions could not be given in evidence (a). But communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty; such, for example, as a letter by a private individual to the chief secretary of the postmaster-general, complaining of the conduct of the guard of the mail towards a passenger (b).

§ 690. There is a *fourth* species of evidence which is excluded on public grounds, namely, that which is *indecent*, or offensive to public morals, or *injurious to the feelings or interest of third persons*, the parties themselves having no interest in the matter, except what they have impertinently and voluntarily created. The mere indecency of disclosures does not in general suffice to exclude them, where the evidence is necessary for the purposes of civil or criminal justice; as, on an indictment for a rape; or on a question upon the sex of one claiming an estate entailed, as heir male or female; or upon the legitimacy of one claiming as lawful heir; or in an action by the husband for criminal conversation with the wife. In these and similar cases the evidence is necessary, either for the proof and punishment of crime, or for the vindication of rights existing before, or independent of, the fact sought to be disclosed. But where the parties have voluntarily and impertinently interested themselves in a question, tending to violate the peace of society by exhibiting an innocent third person to the world in a ridiculous or contemptible light, or to disturb his peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers (c) or contracts respecting the sex of a third person (d),

(z) *Gray v. Pentland*, 2 Serg. & R. 23, 31, 32, per Tilghman, C. J., cited with approbation in *Yoter v. Sanno*, 6 Watts, 166, per Gibson, C. J. See ante, § 666.

(a) *Cooke v. Maxwell*, 2 Stark. R. 183, per Bayley, J.

(b) *Blake v. Pilfold*, 1 M. & Rob. 198.

(c) No wager is now recoverable either at law or in equity 8 & 9 Vict. c. 109, § 18.

(d) *Da Costa v. Jones*, 2 Cowp. 729.

or upon the question, whether an unmarried woman has had a child (*d*).

§ 691. In like manner, the testimony of the husband or wife, that, though living together, they have *had no connexion*, and that therefore the offspring is spurious, has, on the same general ground of decency, morality, and policy, been uniformly rejected (*e*). This rule excludes, not only all direct questions respecting access, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause (*f*); and it applies to the depositions of the parents equally with their *vivâ voce* testimony (*g*). Neither is it affected by the circumstance, that, at the time of the examination of one of the parents, the other is dead; because the rule has been established, not simply on the ground that the tendency of such evidence is to promote connubial dissension, but on the broad basis of general public policy (*h*). But this rule does not preclude the parents from proving, that the supposed marriage was either invalid, or valid (*i*), or that their children were born before, or after, its celebration, though the effect of such evidence is, in the first and third case, to bastardise the issue, and, in the others, to establish its legitimacy (*j*). For this purpose, too, their declarations or their answers in Chancery are admissible evidence (*k*). It is clear also, that, in a case of bastardy, a married woman may, when the fact of her husband's

(*d*) *Ditchburn v. Goldsmith*, 4 Camp. 152. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the Court will not proceed at all in the trial. *Brown v. Leeson*, 2 H. Bl. 43; *Henkin v. Gerss*, 2 Camp. 408. But see *Hussey v. Crickett*, 3 Camp. 168.

(*e*) *Goodright v. Moss*, 2 Cowp. 594; *Cope v. Cope*, 1 M. & Rob. 269, 272—274, per Alderson, B.; 5 C. & P. 604, S. C.; *R. v. Luffe*, 8 East, 193, 202, 203; *R. v. Rook*, 1 Wils. 340; *R. v. Reading*, Ca. Temp. Hardw. K. B. 79; *R. v. Mansfield*, 1 Q. B. 444; 1 G. & D. 7, S. C.; *Com. v. Shepherd*, 6 Binn. 283.

(*f*) *R. v. Sourton*, 5 A. & E. 180, 185, 188, 189. In this case, with the view of proving non-access, the father was asked whether, at a particular time, he did not live 100 miles from his wife, and cohabit with her sister. Held, this question could not be put.

(*g*) *Goodright v. Moss*, 2 Cowp. 592, per Lord Mansfield; *Cope v. Cope*, 1 M. & Rob., 272—274, per Alderson, B. (*h*) *R. v. Kea*, 11 East, 132.

(*i*) *R. v. Bramley*, 6 T. R. 330; *Standen v. Standen*, Pea. R. 32.

(*j*) *Goodright v. Moss*, 2 Cowp. 591, and the cases referred to in Lord Mansfield's judgment, 593, 594. (*k*) *Id.*

non-access has already been proved by independent evidence, confess her adulterous connexion with another person, and thus enable the justices, in the event of her testimony being corroborated in some material particular (*l*), to make the order of maintenance (*m*). But this exception to the general rule of exclusion is founded on necessity; since the fact, to which she is permitted to testify, is probably within her own knowledge and that of the adulterer alone (*n*).

(*l*) 7 & 8 Vict. c. 101, § 3; 8 & 9 Vict., c. 10, § 6.

(*m*) *R. v. Reading*, Ca. Temp. Hardw. 79; 1 Bott, 439, S. C.; *Cope v. Cope*, 1 M. & Rob. 273, n. (*α*).

(*n*) *R. v. Luffe*, 8 East, 203, per Lord Ellenborough. See further on the subject of communications between husband and wife, under the head, *Competency of Witnesses*.

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